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No. 05-8820 *** CAPITAL CASE ***
Title: Gary Lawrence, Petitioner
v.
Florida
Docketed: January 25, 2006
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (04-15435)
Decision Date: August 26, 2005
Questions Presented

| ~~Date~~ | ~~~~~~~Proceedings and Orders~~~~~~~

Court.) For respondent: Christopher M. Kise, Tallahassee, Fla.

NO. 05-8820

IN THE SUPREME COURT OF THE UNITED STATES

GARY LAWRENCE,

Petitioner,

VERSUS

STATE OF FLORIDA,

Respondent.

ORIGINAL

Supreme Court, U.S.
FILED
JAN 23 2006
OFFICE OF THE CLERK

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Capital Case
Questions Presented for Review

I. There is a split in the circuits about whether the one-year period of limitations is tolled for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment of claim is pending . . . ." Antiterrorism and Effective Death Penalty Act (AEDPA) 28 U.S.C Section 2244(d) (2). Where a defendant facing death has pending a United States Supreme Court certiorari petition to review the validity of the state's denial of his claims for state post-conviction relief, does the defendant have an application pending which tolls the 2244(d)(2) statute of limitations?

II. Alternatively, does the confusion around the statute of limitations -- as evidenced by the split in the circuits – constitute an "extraordinary circumstance," entitling the diligent defendant to equitable tolling during the time when his claim is being considered by the United States Supreme Court on certiorari?

III. And in the second alternative, do the special circumstance where counsel advising the defendant as to the statute of limitations was registry counsel – a species of state actor – under the monitoring supervision of Florida Courts, with a statutory duty to file appropriate motions in a timely manner,[1] constitute an "extraordinary circumstance" beyond the defendant's control such that the doctrine of equitable tolling should operate to save his petition?

[1] Florida Statutes Section 27.711(12)

PARTIES TO THE PROCEEDING COMPLIANCE WITH RULE 14(b)

The parties concerned are included in the caption of this matter and there are no corporate parties.

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Opinions Below

A. Direct appeal.

In March 1995, a Florida jury convicted Gary Lawrence of one count each of premeditated murder in the first degree, conspiracy to commit murder, petit theft, and grand theft of a motor vehicle. Following the jury's recommendation of a death sentence based on the murder conviction, the trial court sentenced Lawrence to death. The Florida Supreme Court affirmed Lawrence's conviction and sentence.[1] Court denied certiorari review from the substantive conviction on January 20, 1998.[2]

B. Collateral Proceedings.

From January 1999 to November 2002, Lawrence sought post conviction relief in Florida Courts. The trial court denied Lawrence's petition for state post-conviction relief on October 11, 2000. And on October 17, 2002, the Florida Supreme Court affirmed the trial court's denial of state post-conviction relief.[3] Lawrence petitioned this Court for Certiorari relief from that denial.

On March 11, 2003 -- while his petition not yet having been ruled on was still before this Court – Lawrence sought habeas relief in federal court pursuant to 28

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[1] *Lawrence v. State*, 698 So.2d 1219 (Fla.1997).

[2] *Lawrence v. Florida*, 538 U.S. 926 (2003).

[3] *Lawrence v. State*, 831 So.2d 121 (Fla.2002).

U.S.C. § 2254. Thirteen days later, on March 24, 2003, this Court denied certiorari review of the Florida Supreme Court's denial of post-conviction relief.[4]

C. The Timeliness of Lawrence's Federal Habeas Petition.

The State responded to Lawrence's March 11, 2003 (and supplemental pleadings), urging the federal habeas petition's dismissal on the ground Lawrence was time-barred. The State also argued that equitable tolling should not apply in Lawrence's case. Lawrence opposed the dismissal because there was a disagreement among the Circuits on the question of whether a petition for certiorari to this Court following the denial of state post-conviction relief tolls the limitation period.

Lawrence further argued that doctrine of equitable tolling should operate to save his petition since (1) counsel who advised him of the timing of his petition was selected, pre-qualified and monitored by the State of Florida under its registry statute; (2) Lawrence's mental abilities prevented him from meaningfully participating in a relationship with his counsel; and (3) he had a facially strong constitutional claim.

On April 12, 2004, the district court entered an order staying the proceedings. Although rejecting the equitable tolling argument, the court found that the petition's timeliness "depends upon whether the one-year limitations period was tolled during the pendency of Petitioner's petition for writ of certiorari in the United States Supreme

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[4] *Lawrence v. Florida*, 538 U.S. 926 (2003).

Court challenging the state court's denial of his motion for state collateral review."[5]

The court noted that although Eleventh Circuit precedent stated that the limitations period was not tolled during the pendency of a petition for certiorari challenging the state court's denial of post-conviction relief,[6] there was a split the Circuits.[7] Because of the then-pending certiorari petition in *Abela v. Martin*[8] which held contrary to Eleventh circuit's position on the statute of limitations, the district court entered an order staying the proceedings.[9] The district court noted that if the Supreme Court denied review in *Abela*, then it would dismiss Lawrence's petition based on Eleventh Circuit law.[10]

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[5] Dist. Ct. Order 28 at 1-2.

[6] *Coates v. Byrd*, 211 F.3d 1225 (11th Cir.2000)("[T]he time during which a petition for writ of certiorari is pending, or could be filed, following the denial of collateral relief is state courts, is not to be subtracted from the running of time for 28 U.S.C. Section 2244(d)(1) statute of limitations purposes.")

[7] *Abela v. Martin*, 348 F.3d 164, 170 (6th Cir. 2003) ("[I]f there is a certiorari petition pending to review the validity of the state's denial of such an application for state post-conviction review, the application is still pending . . . ." (quotations omitted))

[8] Certiorari denied sub nom. *Caruso v. Abela*, 541 U.S. 1070, 124 S.Ct. 2388, 158 L.Ed.2d 976 (2004).

[9] The State took an interlocutory appeal from this ruling, arguing that the trial court lacked power to stay the proceedings. That appeal was ultimately dismissed by the United States Court of Appeals for the Eleventh Circuit.

[10] Dist. Ct. Order 28 at 1-2.

About six weeks later, on May 27, 2004, when the Supreme Court denied review in *Caruso v. Abela*, the district court noted in an order that Lawrence's petition was time-barred based on *Coates v. Byrd*[11] and ultimately dismissed the petition. Lawrence filed a motion for a Certificate of Appealability (COA), which the district court granted, stating the question was "whether the one-year limitations period applicable to a petition for writ of habeas corpus under 28 U.S.C. § 2254 barred this petition, and on the legal issue whether the statute of limitations is tolled during the pendency of a petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of petitioner's earlier motion for state collateral review."[12] The Eleventh Circuit Court of Appeals affirmed the dismissal on August 26, 2005.[13]

Jurisdiction

The Eleventh Circuit Court of Appeals' jurisdiction was invoked from the denial by the United States District Court for the Northern District of Florida of a Motion to Vacate filed under Title 28 United States Code, Section 2254, in this Death Case, under Title 28 United States Code, section 1291.

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[11] Dist. Ct. Order 34 at 2.

[12] Dist. Ct. Order 45, at 4.

[13] *Lawrence v. Florida*, 421 F.3d 1221 (11th Cir. 2005)

The Court of Appeals' decision was entered on August 26, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

Constitutional and Statutory Provisions

This case concerns the interpretation of the habeas corpus statute. Chapter 153 of the AEDPA includes a statute of limitations and tolling provision for federal habeas petitions filed by state prisoners. 28 U.S.C. § 2244(d)

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by the State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court and made retroactively applicable by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Statement of the Case

Lawrence was found guilty, along with his wife, of the beating death of his wife's lover.[14] The relevant facts to the questions presented in this pleading are generally set out the Opinions Below section above. But on the issue of equitable tolling, these facts are also material: Lawrence's trial counsel recognized that Lawrence is "very, very slow."[15] In fact, experts opined that Lawrence's full scale IQ is 81 – the lowest part of the low average range. And none of his other scores match what would be expected of someone with an IQ of 81. Lawrence never achieved anything more than a person with a borderline retarded range. He reads like an 11-year old, although he is over 40; his writing skills fall slightly under those of a 9-year old; his factual knowledge is that of an 11-year old.[16] He left school in the 7th grade, yet was unable to read; his IQ placed him in the lowest fifth percentile of children – only four out of 100 children would place lower than he.

Reasons for Granting the Writ

The issues here presented–whether the AEDPA's timeclock does not contemplate time abeyance for the filing of a petition to this Court for Certiorari review–is one on

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[14] *Lawrence v. State*, 698 So.2d 1219,1220 (Fla. 1997)

[15] Tr. 46, 56

[16] Penalty Phase transcript 42,45,47, 48

which the Courts of Appeal are in conflict The position of the Eleventh Circuit Court of Appeals results in a time-bar in this Death Case, through no fault of Mr. Lawrence, would not be present in another Circuit.

The Eleventh Circuit Court of Appeals has decided this vitally important question of federal law which has not been, but surely should be, settled by this Court.

Also, the State of Florida has a special relationship to its Death Row defendants as the State post conviction scheme guarantees and monitors all post conviction State-appointed death row counsel.

Legal Presentation

1. The decision of the Sixth Circuit Court of Appeals in this case conflicts with the decisions of other United States Courts of Appeals regarding whether the habeas tolling provision for state post-conviction or other collateral review extends to certiorari proceedings before this Court. The Eleventh Circuit (and others) have concluded that the one-year statute of limitation applicable to federal habeas corpus petitions is **not** tolled during the period in which a petitioner may seek, and the Supreme Court considers whether to grant, certiorari review of the denial of the petitioner's State collateral relief motion.[1] The reasoning of this conclusion is that the

[1] See *Smaldone v. Senkowski*, 273 F.3d 133, 136-138 (2nd Cir. 2001); *Stokes v. District Attorney of the County of Philadelphia*, 247 F.3d 539, 542-543 (3rd Cir. 2001) cert denied; 534 U.S. 959 (2001); *Miller v. Dragovich*, 311 F.3d 574 (3rd. Cir. 2002); *Crawley v. Catoe*, 257 F.3d 395, 398-400 (4th Cir. 2001); *Ott v. Johnson*, 192

statute's language and underlying purpose justify a pre-certiorari time bar. Section 2244 (d)(1) includes the phrase conclusion of direct review, which was recently defined as the denial or conclusion of certiorari by this Court.[2] By contrast, Section 2244(d)(2) tolling provision stops the clock so long as a "state post-conviction or other collateral review . . . is *pending*." The argument goes that there is no textural basis for interpreting Section (d)(2) to include a federal appeal of collateral issues because the word pending does not conjure up for some minds the specter of federal review with the same intensity as the phrase "conclusion of direct review."

Three years after the Eleventh Circuit gave these reasons for not tolling during this Court's certiorari review, the Sixth Circuit, sitting *en banc*, reached the opposite conclusion in *Abela v. Martin*.[3] In that court's view, the difference in language between the subsections (d)(1) and (d)(2) was not significant. Instead, the court found that the language of subsection (d)(2) resolves the situation conclusively. That court

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F.3d 510, 513 (5th Cir. 1999); *Gutierrez v. Schomig*, 233 F.3d 490, 492 (7th Cir. 2000) cert denied, 532 U.S. 950 (2000); *White v. Klitzkie*, 281 F.3d 920, 923-925 (9th Cir. 2002); *Rhine v. Boone*, 182 F.3d 1153, 1155-1156 (10th Cir. 1999); *Coates v. Byrd*, 211 F.3d 1225, 1226 (11th Cir. 2000).

[2] *Bond v. Moore*, 309 F.3d 770, 771 (11th Cir. 2002)("Appellant argues that his petition was not time-barred because the limitation period did not begin to run until the 90-day window during which Appellant could have petitioned the United States Supreme Court for a writ of certiorari expired. We agree with Appellant."

[3] 348 F.3d 164, 170 (6th Cir. 2003) cert. denied *Caruso v. Abela*, 541 U.S. 1070, 124 S.Ct. 2388, 158 L.Ed.2d 976 (2004).

reasoned that the tolling provision required that the application for state post-conviction relief be *pending* – not that it be pending in state court. So while the petition is pending before this Court, it satisfies the statutory requirement – even through it is no longer pending in state court,

> If there is a certiorari petition pending review of the validity of the state's denial of such application for state post conviction review, the application is still "pending"– that is, not finally decided. The application does not thereby stop being a state habeas proceeding or turn into a federal rather than state application; it's just not finally decided yet.

Positions contrary to tolling are premised on misapprehensions of the statute and the nature of certiorari review. In other words, the petition remains a pending motion which has moved to its next phase before this Court. There is no independent jurisdiction to hear such matters as "new" petitions. The petition and the entire litigation remains a pending state motion to vacate unless and until this Court speaks or the time in which to seek Certiorari review has expired.

In *Rhine v. Boone*, the Tenth Circuit parses the statute, stretching the modifier to reach the conclusion which, Mr. Lawrence submits, was unintended by Congress. It writes,

> We are satisfied that, in the wording of § 2244(d)(2), "State" modifies the phrase "post-conviction review" and the phrase "other collateral review." A petition for writ of certiorari to the United States Supreme Court is simply not an application for state review of any kind; it is neither an

> application for state post-conviction review nor an application for other state collateral review.[4]

But the logic here is undercut by an examination of certiorari's function, as pointed out by the dissent in *White v. Klitzkie*: "The United States Court . . . can consider state . . . cases when they raise federal issues. Otherwise, what is the United States Supreme Court hearing when it considers a state habeas petition on certiorari [?] Not an application for federal post-conviction review or other collateral review."[5]

Whatever predilections informed the Tenth's Circuit's conclusions about which words are modified by the word "state" and the nature of a writ of certiorari to this Court, it is also true that sound compelling arguments exist to support a contrary conclusion:

> The focus of section 2244(d)(2) is not the court in which the application is pending but on the application itself. As long as the petition for certiorari involves an application for state court relief, section 2244(d)(2) requires that the statute of limitations be tolled. The court where the application is pending is irrelevant.[6]

What about the statute's intent? It is almost a certainty that not a single member of Congress has represented a death sentenced individual in a post conviction matter under the AEDPA. Many Congressmen and Congresswomen are lawyers, however, and if they were to draw on their own common-sense reading of the statute as they

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[4] 182 F.3d 1153, 1156 (10th Cir. 1999).
[5] 282 F.3d 920, 927-8 (9th Cir. 2002).
[6] *Abela* at 170.

passed it, Mr. Lawrence submits that they clearly wanted to place a time limit on post conviction litigation, but that they saw one phase as "State" and one phase as "federal." To believe that the statute and the lawmakers intended to make a distinction between staying federal proceedings while a *petition for certiorari from the direct conviction in the State court went before this Court* and the scenario when a *petition for certiorari from the post-conviction litigation in State courts*, is to stretch common sense and credulity. Particularly when no Congressional History mentions such distinction; no meaningful purpose can be served other than lulling practitioners and ultimately defendants into either a calm belief that they had a grasp on the common-sense meaningof the statute, or into unknowingly, unintentionally, and involuntarily waiving their right to have the federal system protect federal rights.

Beginning the limitations period after the 90 days when a petitioner could seek this Court's certiorari review doesn't controvert the law's purpose of limiting the time when a petitioner has access to federal courts. Moreover, including the 90 days avoids the almost certainly unintended consequence of requiring a petitioner to file his petition seeking federal habeas corpus relief before he has sought certiorari review of his state post-conviction claims to this Court. Such an outcome does not promote finality of state court determinations and encourages the simultaneous filing of two actions seeking essentially the same relief.

The court in *Miller v. Dragovich*[7] suggests that the patent complications of comity and exhaustion raised by excluding the 90-day certiorari period could be avoided by having the federal district court hold the case in abeyance pending this Court's decision on state post-conviction review. The real-world implications presented by this simple fix – in terms of additional litigation, uncertainty and bother – are illustrated by *Coleman v. Davis*, where the petitioner filed a successful writ of certiorari to this Court had to sue for his day in federal court:

> In this case, the United States Supreme Court granted certiorari, vacated the decision of the Indiana Supreme Court, and remanded the case to that court for further review . . . . Thus the initial judgment of the Indiana Supreme Court was nullified, and as a result, Coleman's post-conviction petition was still "pending" until that court issued its judgment on December 29, 2000, and denied rehearing on March 20, 2001. Because the ultimate outcome of Coleman's petition for writ of certiorari was the invalidation of the Indiana Supreme Court's denial of his post-conviction petition, none of the time after the entry of that judgment can be charged under the statute because ultimately the case was still pending before that court. The grant of certiorari, and vacation of the Indiana court's order, retroactively tolled the statute. This is an appropriate outcome because it precludes simultaneous review of the same Indiana Supreme Court decision by both the United States Supreme Court and this court.[8]

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[7] 311 F.3d 574, 580-581 (3rd Cir. 2002).

[8] 175 F.Supp.2d 1109, 1110 (N.D.Ind.2001).

The better solution is to begin the limitations period after the possibility of this Court's nullification of the state court's denial of state post-conviction claims.

2. Title 28 U.S.C. § 2244(d) is a statute of limitations that is subject to equitable tolling, not a jurisdictional bar.[9] But such tolling is generally available only when the petitioner can show (1) extraordinary circumstances (2) beyond his control (3) that made it impossible to file his petition on time.[10]

The exception to this rule can be found in *Fahy v. Horn*, a case where the petition was 35 days late because of attorney error in interpreting debatable procedural provisions, the Third Circuit tolled the precise statute at issue here – applying equitable tolling in a capital case involving a petitioner convicted of killing 13 people.[11] The *Fahy* court reasoned that a court "must allow less than 'extraordinary' circumstances to trigger equitable tolling of the AEDPA's statute of

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[9] *Sandvik v. United States*, 177 F.3d 1269 (11th Cir.1999); *Henderson v. Johnson*, 1 F.Supp.2d 650 (S.D.Tex.1998).

[10] See *Pace v. DiGuglielmo*, 125 S.Ct. 1807 (2005); *Sandvik*, 177 F.3d at 1271-1272 (citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990); *Calderon v. United States District Court*, 163 F.3d 530, 541 (9th Cir.1998)(en banc); *Miller v. New Jersey Department of Corrections*, 145 F.3d 976, 978 (10th Cir.), *cert. denied*, 119 S.Ct.(1998)); *Turner v. Singletary*, 46 F.Supp.2d 1238, 1242 (N.D.Fla.1999).

[11] 240 F.3d 239,245 (3rd Cir. 2001) cert. denied, *Horn v. Fahy*, 534 U.S. 944, 122 S.Ct. 323, 151 L.Ed.2d 241, (2001); accord *Banks v. Horn*, 272 F.3d 527, 534-35 (3rd Cir. 2001), rev'd on other grounds, 536 U.S. 266 (2002).

limitations when a [capital] petitioner has been diligent in asserting his or her calims and rigid application of the statute would be unfair."[12]

The court explained:

> If we refuse to equitably toll the statute, then we would deny this capital defendant federal review of his claims. Fahy diligently asserted his claims and the strategic choices he made during the appeal process were reasonable. When state law is unclear regarding the operation of a procedural filing requirement, the petitioner files in state court because of his or her reasonable belief that a § 2244 petition would be dismissed as unexhausted, and the state petition is ultimately denied on these grounds, then it would be unfair not to toll the statute of limitations during the pendency of that state petition up to the highest reviewing state court. We will therefore equitably toll the AEDPA's statute of limitations. We elect to exercise this leniency under the facts of this capital case where there is no evidence of abuse of the process.[13]

Equity applies here for a number of reasons. Lawrence's chief reason is the lack of clarity in the relevant law and the facts that Lawrence's strategic choices regarding Section 2244(d)(2) statute of limitations period were reasonable -- and indeed are so sound and sensible that Lawrence's position is the law everywhere the Sixth Circuit Court of Appeals enjoys jurisdiction.

When Lawrence filed his federal habeas claim on March 11, 2003 – as is evidenced by the split in the circuits – reasonable, educated minds disagreed (as they

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[12] *Fahy*, 240 F.3d at 245; see also Corjasso v. Ayers, 278 F.3d 847 (9th Cir. 2002) (tolling AEDPA's statute of limitations despite a procedural defect and listing cases.) Cf *Steed v. Head*, 219 F.3d 1298 (11th Cir. 2000).

[13] *Fahy* at 245.

do now) about the statute of limitations under 2244(d)(2). For this reason, this case is distinct from cases denying claims for equitable tolling where an arithmetic error has resulted in miscalculation of filing deadlines. Lawrence had been diligent and there is no evidence or allegation of abuse of process.

Rather than decide the larger question of 2244(d)(2) statute of limitations, this Court could bestow leniency on these narrow facts where Lawrence a petitioner -- facing death -- filed his habeas petition in federal court under the belief that it was timely because the validity of his state post-conviction claims was still under review before this Court.

Additionally other factors mitigate in favor of leniency. Where the *Fahy* court looked to the reasonableness of the petitioner's strategic choices and absence of abuse of process, other courts have considered the potential merits of the substantive claim barred under a statute of limitations. As the dissent in *Drew v. Department of Corrections* noted, "A statute of limitations contains an inherent element of harshness, since it operates to deprive litigants of the ability to protect their rights simply by the passage of time . . . . When certain circumstances prevent a litigant from acting within the statutory period, however, the doctrine of equitable tolling

abates this harshness by "stopping the clock" during the time the litigant was unable to act."[14]

We urge consideration of the merits of the Lawrence's underlying claim – gross ineffectiveness of counsel – in deciding whether to grant relief in equity. The facts of Lawrence's case are an example of the kind of circumstance that courts refer to when they note that barring a meritorious claim would be unjust.[15]

Other factors beyond the merit of Lawrence's habeas claims are (1) counsel who advised Lawrence was selected by, pre-qualified and monitored by the State of Florida under its registry statute[16] (2) Lawrence is nearly retarded and couldn't

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[14] 297 F.3d 1278 (11th Cir. 2002) (dissent).

[15] *Justice v. United States*, 6 F.3d 1474, 1475 (11th Cir.1993) ("The doctrine of equitable tolling abates the harsh operation of the statute of limitations under certain circumstances in which barring a plaintiff's potentially meritorious action would be unjust."); *Murray v. Carrier*, 477 U.S. 478 (1986) (Stevens, J. concurring)(A facially strong constitutional claim that questions the fundamental fairness of the very process by which a petitioner was convicted and sentenced "compels review regardless of procedural defaults."); see also *Hensley v. Mun. Court*, 411 U.S. 345, 349-50 the ability to cut through barriers of form and procedural mazes. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." (internal quotation marks and citations omitted)).

[16] Lawrence acknowledges that erroneous advice of counsel does not generally form the basis of a successful application for equitable tolling. But the law is equally clear that Florida courts have a duty to monitor registry counsel's performance:

> The court shall monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation. The court shall also receive and evaluate allegations that are made regarding the

CONCLUSION

THEREFORE, Petitioner GARY LAWRENCE , requests of this Court that it GRANT its Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, directing it to grant the writ or, in the lesser alternative, remand the matter to the United States District Court for the Northern District of Florida for

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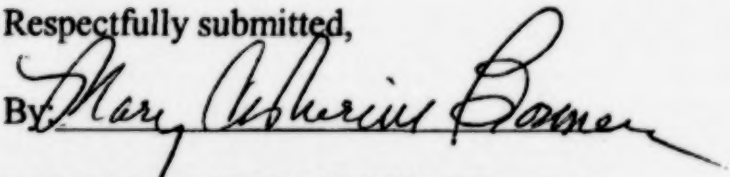
> performance of assigned counsel. The Chief Financial Officer, the Department of Legal Affairs, the executive director, or any interested person may advise the court of any circumstance that could affect the quality of representation, including, but not limited to, false or fraudulent billing, misconduct, failure to meet continuing legal education requirements, solicitation to receive compensation from the capital defendant, or failure to file appropriate motions in a timely manner.
>
> Florida Statutes section 27.711(12).

an evidentiary hearing or other appropriate disposition.

Respectfully submitted,

By: 

MARY CATHERINE BONNER, ESQ.
Counsel of Record for Mr. Lawrence
207 S.W. 12th Court
Ft. Lauderdale, FL 33315
(954) 523-6225

NO.

IN THE SUPREME COURT OF THE UNITED STATES

GARY LAWRENCE,

Petitioner,

VERSUS

STATE OF F LORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

MARY CATHERINE BONNER, ESQ.
Counsel of Record for Mr. Lawrence
207 S.W. 12th Court
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(954) 523-6225
Attorney for Petitioner

H

United States Court of Appeals,
Eleventh Circuit.
Gary LAWRENCE, Petitioner-Appellant,
v.
State of FLORIDA, Respondent-Appellee.
No. 04-15435.

Aug. 26, 2005.

Background: Defendant convicted of capital murder and sentenced to death, 698 So.2d 1219, petitioned for writ of habeas corpus. The United States District Court for the Northern District of Florida, No. 03-00097-CV-97-RH, Robert L. Hinkle, Chief Judge, denied petition as untimely, and appeal was taken.

Holding: The Court of Appeals, Dubina, Circuit Judge, held that petition was time-barred.
Affirmed.

West Headnotes

[1] Criminal Law ⇐1570
110k1570 Most Cited Cases
State has substantial interest in finality of state criminal proceedings, which is injured when stay is granted in post-conviction proceeding.

[2] Habeas Corpus ⇐818
197k818 Most Cited Cases
If district court denies habeas petition on procedural grounds without reaching petitioner's underlying constitutional claims, certificate of appeal (COA) should issue only if petitioner shows that jurists of reason would find it debatable whether petition states valid claim of denial of constitutional right, and that jurists of reason would find it debatable whether district court was correct in its procedural ruling. 28 U.S.C.A. § 2253(c).

[3] Habeas Corpus ⇐603
197k603 Most Cited Cases
Time during which petition for writ of certiorari is pending, or could have been filed, following denial of state post-conviction relief is not subtracted from running of one-year time period for filing of federal habeas petition. 28 U.S.C.A. § 2244(d)(1).

[4] Habeas Corpus ⇐603
197k603 Most Cited Cases
State's provision of post-conviction relief petitioner with allegedly incompetent attorney did not constitute type of state-created impediment that would toll running of one-year limitations period for filing of federal habeas petition. 28 U.S.C.A. § 2244(d)(1)(B).

[5] Habeas Corpus ⇐603
197k603 Most Cited Cases
Equitable tolling of one-year time period for filing of federal habeas petition is extraordinary remedy, sparingly applied when there are extraordinary circumstances that are both beyond petitioner's control and unavoidable even with diligence. 28 U.S.C.A. § 2244(d)(1).

[6] Habeas Corpus ⇐603
197k603 Most Cited Cases
State's provision of post-conviction relief petitioner with allegedly incompetent attorney did not constitute type of extraordinary circumstance that would toll running of one-year limitations period for filing of federal habeas petition. 28 U.S.C.A. § 2244(d)(1)(B).

[7] Habeas Corpus ⇐603
197k603 Most Cited Cases
Habeas petitioner's mental impairments was not extraordinary circumstance that would toll running of one-year limitations period for filing of federal habeas petition, absent showing of causal connection between such impairments and his ability to file timely petition; petitioner had IQ of 81, and did not claim mental incompetence per se. 28 U.S.C.A. § 2244(d)(1)(B).

***1222** Mary Catherine Bonner (Court-Appointed), Attorney at Law, Ft. Lauderdale, FL, for Petitioner-Appellant.

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Cassandra Kaye Dolgin, Tallahassee, FL, for Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Florida.

Before DUBINA, BLACK and CARNES, Circuit Judges.

DUBINA, Circuit Judge:

This is a death penalty case in which the Certificate of Appealability ("COA") presents only one issue for our review: whether the one-year limitations period of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d)(1), bars petitioner **Gary Lawrence's** habeas petition. After reviewing the record, reading the parties' briefs, and having the benefit of oral argument, we agree with the district court that Lawrence's petition was untimely. Accordingly, we affirm the district court's order.

BACKGROUND

In March 1995, a Florida jury convicted Lawrence of one count each of premeditated murder in the first degree, conspiracy to commit murder, petit theft, and grand theft of a motor vehicle. The jury recommended a death sentence based on the murder conviction, and the trial court followed the jury's recommendation and imposed a death sentence. The Florida Supreme Court summarized the facts of the murder as follows:

> Shortly after **Gary** and Brenda **Lawrence** were married, they separated, and another man, Michael Finken, moved in with Brenda and her two daughters, Stephanie and Kimberly Pitts, and Stephanie's friend, Rachel Matin. On the day of the murder, July 28, 1994, Gary and Michael drove Brenda to work and then drank beer at a friend's house. Later, Gary and Michael picked Brenda up and the three returned to the friend's house where they drank more beer. After the three returned to Brenda's apartment, Gary and Michael argued and Gary hit Michael when he learned that Michael had been sleeping with Brenda. Gary and Michael seemed to resolve their differences, and Michael fell asleep on the couch. Gary and Brenda conversed, and Brenda went through the house collecting weapons--including a pipe and a baseball bat. Gary and Brenda told Kimberly and Rachel that they were "going to knock off Mike." Gary told Kimberly to "stay in your bedroom no matter what you hear."

The trial court described what happened after Gary and Brenda spoke to the girls:

> Thereafter, the two girls heard what they described as a pounding sound. At one point, Rachel Matin stated that she heard the victim say, "stop it, if you stop, I'll leave." She stated that she heard that statement several times. Kimberly Pitts stated she heard the victim say, "please don't hit me, I'm already bleeding." The victim's pleas, however, were met with more pounding. Once the pounding stopped, the girls were required to assist in the clean up and described to the jury what they observed. Kimberly stated that much of the victim's right side of his face was missing and his chin was knocked over ***1223** to his ear. Rachel Matin stated that there was no skin left on the victim's face and part of his nose was missing. Apparently the victim was still alive. Kimberly observed her mother coming out of the kitchen area with what appeared to be a dagger and then, although not seeing the dagger in her hand at the time, observed her mother make a stabbing motion toward the victim with something in her hand. It was at that time when Brenda Lawrence requested that the girls obtain the assistance of Chris Wetherbee. Upon his entrance into the home, Chris Wetherbee observed the victim's head being caved in, blood all over, the victim's eyeball protruding approximately three inches and a mop handle shoved into the victim's throat. Wetherbee asked **Gary Lawrence**, "what's going on?" At which time the Defendant responded by pulling out the mop handle and kicking the victim and making the statement "this is what's going on." Immediately after removing the mop handle from the victim's throat, Wetherbee heard the victim give approximately three or four ragged breaths at which time the victim thereafter stopped breathing and apparently expired. The Defendant, **Gary Lawrence**, told Wetherbee that he had beat him with a pipe until it bent and then beat him with a baseball bat.
>
> Chris Wetherbee summarized the victim's state: "And [he] looked like something off of one of the

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real good horror movies." Gary and Brenda then removed a small amount of money from Michael's pockets, wrapped the body in a shower curtain and placed the body in Michael's car, and Gary drove to a secluded area where he set the body afire. When Gary returned home, he and Brenda danced. *Lawrence v. State*, 698 So.2d 1219, 1220 (Fla.1997).

The Florida Supreme Court affirmed Lawrence's conviction and sentence. *Id.* The United States Supreme Court denied certiorari review on January 20, 1998. *Lawrence v. Florida*, 522 U.S. 1080, 118 S.Ct. 863, 139 L.Ed.2d 761 (1998). Lawrence sought state post-conviction relief, and the trial court denied the petition on October 11, 2000. The Florida Supreme Court affirmed the trial court's denial of state post-conviction relief. *Lawrence v. State*, 831 So.2d 121 (Fla.2002). The United States Supreme Court denied certiorari review of the Florida Supreme Court's denial of post-conviction relief. *Lawrence v. Florida*, 538 U.S. 926, 123 S.Ct. 1575, 155 L.Ed.2d 319 (2003).

Lawrence then moved to federal court seeking habeas relief pursuant to 28 U.S.C. § 2254. The filing of his March 11, 2003, federal pro se petition sparked an unusual procedural journey. After filing an amended habeas petition, the State responded that the district court should dismiss the petition because Lawrence was time-barred from obtaining federal habeas relief on either the original petition or the amended petition. The State also argued that equitable tolling should not apply in Lawrence's case. Lawrence opposed the dismissal on the basis that there was a disagreement among the courts of appeal on the question whether a petition for certiorari to the U.S. Supreme Court following the denial of state post-conviction relief tolls the limitation period. Lawrence sought to invoke the doctrine of equitable tolling on the grounds that it was appropriate because (1) counsel who advised him of the timing of his petition was selected by and pre-qualified by the State of Florida under its registry statute; (2) his mental abilities prevented him from meaningfully participating in a relationship with his counsel; and (3) he had a facially strong constitutional claim.

*1224 On April 12, 2004, the district court entered an order staying the proceedings. The court determined that whether Lawrence's petition was time-barred "depends upon whether the one-year limitations period was tolled during the pendency of Petitioner's petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of his motion for state collateral review." [Dist. Ct. Order 28 at 1-2]. The court noted that there was a circuit split on the issue, although Eleventh Circuit precedent clearly stated that the limitations period was not tolled during the pendency of a petition for certiorari challenging the state court's denial of post-conviction relief. *See Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir.2000). On the question of equitable tolling, the district court found that Lawrence had not met the prerequisites to equitable tolling. However, in light of the pending certiorari petition in *Abela v. Martin*, 348 F.3d 164 (6th Cir.2003), *cert. denied sub nom. Caruso v. Abela*, 541 U.S. 1070, 124 S.Ct. 2388, 158 L.Ed.2d 976 (2004), which held contrary to this circuit's decision in *Coates*, 211 F.3d at 1227, the district court entered an order staying the proceedings. The district court noted that if the Supreme Court denied review in *Abela*, then it would dismiss Lawrence's petition based on *Coates*. [Dist. Ct. Order 28 at 1-2].

Subsequently, on May 27, 2004, after the Supreme Court denied review in *Caruso v. Abela*, the district court noted in an order that Lawrence's petition was time-barred based on *Coates*. [Dist. Ct. Order 34 at 2]. However, the court did not enter an order dismissing the petition because the State had lodged an appeal from the district court's stay order. After this court dismissed the State's appeal from the stay order for lack of jurisdiction, the district court entered the order dismissing the petition. Lawrence filed a motion for a COA, which the district court granted. The district court set forth the issue in the COA as "whether the one-year limitations period applicable to a petition for writ of habeas corpus under 28 U.S.C. § 2254 barred this petition, and on the legal issue whether the statute of limitations is tolled during the pendency of a petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of petitioner's earlier motion for state collateral review." [Dist. Ct. Order 45, at 4].

DISCUSSION

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[1] The only issue presented in the COA is whether the one-year limitations period under AEDPA bars Lawrence's habeas petition. After needless delay, the district court determined that Lawrence's petition was untimely.[FN1] "The district court's interpretation and application of a statute of limitations is a question of law that is subject to de novo review." *Hepburn v. Moore*, 215 F.3d 1208, 1209 (11th Cir.2000). We also review de novo the district court's legal decision on equitable tolling. *Drew v. Dep't of Corr.*, 297 F.3d 1278, 1283 (11th Cir.2002); *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir.2000). However, we will reverse the district court's factual determinations only if they are clearly erroneous. *Drew*, 297 F.3d at 1283. The district court's finding whether a party was diligent in ascertaining the federal habeas filing deadline is a finding ***1225** of fact. *See id.* at 1287, 1287 n. 2 (stating that "[t]reating a finding regarding diligence as a finding of fact is consistent with the approach taken by the majority of the circuits in both habeas corpus proceedings and other contexts").

> FN1. We say needless delay because we conclude that the district court abused its discretion in entering a stay order pending a certiorari ruling by the United States Supreme Court in *Caruso v. Abela*, 541 U.S. 1070, 124 S.Ct. 2388, 158 L.Ed.2d 976 (2004). The stay injured the State because the State has a substantial interest in the finality of state criminal proceedings. *See McCleskey v. Zant*, 499 U.S. 467, 493, 111 S.Ct. 1454, 1470, 113 L.Ed.2d 517 (1991). "Each delay, for its span, is a commutation of a death sentence to one of imprisonment." *Thompson v. Wainwright*, 714 F.2d 1495, 1506 (11th Cir.1983).

We begin our discussion by setting forth the limited circumstance under which a court may issue a COA. The right to appeal is governed by the COA requirements set forth in 28 U.S.C. § 2253(c):

> *(c)(1)* Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
>
> *(A)* the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> *(B)* the final order in a proceeding under section 2255.
>
> *(2)* A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> *(3)* The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c).

[2] Under this limited provision, if a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claims, a COA should issue only if the petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S.Ct. 1595, 1601, 146 L.Ed.2d 542 (2000). "[B]oth showings [must] be made before the court of appeals may entertain the appeal." *Id.* at 485, 120 S.Ct. at 1604. If the procedural bar is obvious and the district court correctly invoked it to dispose of the case, "a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Id.* at 484, 120 S.Ct. at 1604. The court may first resolve the issue whose answer is more apparent from the record and the arguments. *Id.* at 485, 120 S.Ct. at 1604. "The recognition that the court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of, allows and encourages the court to first resolve procedural issues." *Id.* (quotations and citation omitted).

[3] Because of the statutory constraint in issuing a COA, we are puzzled by the district court's issuance of a COA in this case. The district court should not have issued a COA on the statute of limitations issue because binding circuit precedent clearly disposed of the issue. "[T]he time during which a petition for writ of certiorari is pending, or could have been filed, following the denial of collateral relief in the state courts, is not to be subtracted from the running of time for 28 U.S.C. §

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2244(d)(1) statute of limitations purposes." *Coates*, 211 F.3d at 1227. On that basis, jurists of reason would not find the timeliness issue debatable in this circuit. Thus, a COA should not have issued.

However, the district court did issue a COA on the statute of limitations issue. Although the COA does not specifically state that the exceptions to the statute of limitations--State impediment and equitable tolling--are included within the COA, Lawrence contends that these exceptions are subsumed within the COA and properly before this court for consideration. We agree. To decide whether the statute of limitations bars Lawrence's federal habeas petition, we must consider whether a State ***1226** impediment or equitable tolling excepts the one-year filing deadline. If Lawrence can demonstrate that a State impediment prevented him from timely filing or that equitable tolling applies to his case, then his petition is timely.

[4] Lawrence contends that 28 U.S.C. § 2244(d)(1)(B) [FN2] applies to his case because the State caused an impediment to his timely filing by providing him with an incompetent attorney through the Florida counsel registry system. It is not clear, however, that Lawrence asserted a § 2244(d)(1)(B) impediment to the district court. We generally do not consider an issue that was not raised in the district court. *Calzadilla v. Banco Latino Int'l*, 413 F.3d 1285, 1287 (11th Cir.2005); *Rhine v. Boone*, 182 F.3d 1153, 1154 (10th Cir.1999) (refusing to consider § 2244(d)(1)(B) argument because petitioner did not argue in district court that State had created an impediment to his filing in violation of the Constitution). Assuming Lawrence presented this issue to the district court, we conclude that Lawrence's assertion that the State impeded him from timely filing by providing an incompetent attorney to assist him after setting up a State registry system to monitor attorney performance, is meritless. This is not the type of State impediment envisioned in § 2244(d)(1)(B).

> FN2. This provision states that the one-year limitation period shall begin to run on "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action." 28 U.S.C. § 2244(d)(1)(B).

[5] Additionally, Lawrence cannot show that there are extraordinary circumstances present in his case to warrant the application of equitable tolling. "Equitable tolling is an extraordinary remedy which is typically applied sparingly." *Steed*, 219 F.3d at 1300. It is available "when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir.1999). Equitable tolling is limited to rare and exceptional circumstances, such as when the State's conduct prevents the petitioner from timely filing. *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir.2000); *see also Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 458, 112 L.Ed.2d 435 (1990) (stating that the Court has allowed equitable tolling in situations where complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass); *Arce v. Garcia*, 400 F.3d 1340, 1349 (11th Cir.2005) (noting that in order to invoke equitable tolling, courts usually require some affirmative misconduct, such as deliberate concealment).

[6] Making the most of a novel argument, Lawrence posits that the State's provision to him of an incompetent attorney justifies the imposition of equitable tolling. This is not an extraordinary circumstance that warrants the application of equitable tolling. Moreover, we have stated on numerous occasions that "attorney negligence is not a basis for equitable tolling, especially when the petitioner cannot establish his own diligence in ascertaining the federal habeas filing deadline." *Howell v. Crosby*, 415 F.3d 1250, 1250 (11th Cir.2005); *accord Helton v. Secretary for the Dep't of Corr.*, 259 F.3d 1310, 1313 (11th Cir.2001); *Steed*, 219 F.3d at 1300; *Sandvik*, 177 F.3d at 1270.

[7] Lawrence also contends that his mental incapacity prevented him from timely filing and justifies the invocation of equitable tolling. However, Lawrence cannot establish a causal connection between his alleged mental incapacity and his ability to file a timely petition. Lawrence ***1227** admits in his appellate brief

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that medical reports state that his full scale IQ is 81, and he admits that he did not make the assertion that he was mentally incompetent per se. Instead, Lawrence claims that his initial pleading made it clear that he has suffered from mental impairments his entire life. However, this contention, without more, is insufficient to justify equitable tolling. *See* Bilbrey v. Douglas, 124 Fed.Appx. 971, 973 (6th Cir.2005) (finding that equitable tolling did not apply because petitioner "failed to establish a causal connection between her mental condition and her ability to file a timely petition"); *Green v. Hinsley*, 116 Fed.Appx. 749, 751 (7th Cir.2004) (finding that equitable tolling did not apply because petitioner failed to submit evidence of how his low IQ would render him incompetent or prevent him from timely filing his petition); *Fisher v. Gibson*, 262 F.3d 1135, 1145 (10th Cir.2001) (finding that petitioner's mere allegations of incompetency at the time of his guilty pleas did not suffice to warrant equitable tolling of the limitations period); *Collins v. Scurr*, 230 F.3d 1362 (8th Cir.2000) (Table) (finding that bald and unsupported assertions that relate to an instance of alleged mental incompetency that occurred at a time remote to petitioner's habeas petition filing deadline did not equitably toll the statute of limitations); *Fisher v. Johnson*, 174 F.3d 710, 716 (5th Cir.1999) (finding that equitable tolling did not apply when petitioner's brief period of incapacity "occurred at a time so remote to his deadline" and petitioner could not show that he diligently pursued his application the remainder of the one-year filing deadline); *cf. Laws v. Lamarque*, 351 F.3d 919, 923 (9th Cir.2003) (remanding case for further factual development on issue of whether petitioner's mental illness prevented him from timely filing his federal habeas petition as to warrant the application of equitable tolling); *Nara v. Frank*, 264 F.3d 310, 320 (3d Cir.2001) (remanding case for further factual development where petitioner "presented evidence of ongoing, if not consecutive, periods of mental incompetency" because mental incompetence may constitute an extraordinary circumstance for purposes of tolling the statute of limitations when a person's mental deficiency affects his ability to file a timely habeas petition).

CONCLUSION

For the above stated reasons, we affirm the district court's order dismissing Lawrence's habeas petition as untimely.

AFFIRMED.

421 F.3d 1221, 18 Fla. L. Weekly Fed. C 884

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

GARY LAWRENCE

VS

CASE NO. 3:03CV97 RH

STATE OF FLORIDA

JUDGMENT

Pursuant to and at the direction of the Court, it is

ORDERED AND ADJUDGED that the Petition for writ of habeas corpus is DENIED as untimely

WILLIAM M. McCOOL, CLERK OF COURT

September 20, 2004
DATE

s/ Ma'Su Sweeney
Deputy Clerk: Ma'Su Sweeney

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

GARY LAWRENCE,

Petitioner,

v. CASE NO. 3:03cv97-RH

STATE OF FLORIDA,

Respondent.

_____/

ORDER FOR DISMISSAL

For the reasons set forth in the orders of April 13, 2004 (document 28), April 21, 2004 (document 30), and May 27, 2004 (document 34), and in light of the dismissal of respondent's attempted appeal, denial of the petition as untimely now is appropriate. Accordingly,

IT IS ORDERED:

The clerk shall enter judgment stating, "The petition for writ of habeas corpus is DENIED as untimely." Petitioner's motion for an extension of time (document 38) is DENIED as moot. The clerk shall close the file.

SO ORDERED this 16th day of September, 2004.

s/Robert L. Hinkle
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

GARY LAWRENCE,

Petitioner,

v. CASE NO. 3:03cv97-RH

STATE OF FLORIDA,

Respondent.

_____/

ORDER GRANTING CERTIFICATE OF APPEALABILITY

Final judgment has been entered denying this petition for writ of habeas corpus under 28 U.S.C. §2254. Petitioner has filed a timely notice of appeal. Under 28 U.S.C. §2253(c)(1), however, petitioner may not appeal unless a certificate of appealability is issued. Under *Edwards v. United States*, 114 F.3d 1083 (11th Cir. 1997), petitioner's notice of appeal is deemed an application for a certificate of appealability. Petitioner also has filed separate motions for a certificate of appealability, for appointment of counsel for appeal, and for leave to proceed on appeal in forma pauperis. Respondent has filed a memorandum in opposition.

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A certificate of appealability may be issued only if petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). *See Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 1039-40. 154 L. Ed. 2d 931 (2003) (explaining meaning of this term); *Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (same); *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983); *see also Williams v. Taylor*, 529 U.S. 362, 402-13, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (setting forth standards applicable to §2254 petitions on the merits). As the Court said in *Slack*:

> To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "'adequate to deserve encouragement to proceed further.'"

Slack, 529 U.S. at 483-84, *quoting Barefoot*, 463 U.S. at 893 n.4. Further, in order to obtain a certificate of appealability when dismissal is based on procedural grounds, a petitioner must show, "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

In the case at bar, the petition was denied as untimely. The dispositive issue is whether the one-year limitations period applicable to a petition for writ of habeas corpus under 28 U.S.C. §2254 is tolled during the pendency of a petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of petitioner's earlier motion for state collateral review. *See* 28 U.S.C. §2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward any period of limitation under this subsection."). There is a circuit split on this issue. *Compare, e.g., Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000), *and Steed v. Head, 219 F.3d 1298*, 1300 (11th Cir. 2000), *with Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003) (en banc), *cert. denied sub nom. Caruso v. Abela*, 72 U.S.L.W. 3506. 2004 WL 193884 (May 24, 2004) (No. 03-1079).

Jurists of reason could not debate whether this issue is settled at the panel level in the Eleventh Circuit; under *Coates* and *Steed*, the issue is settled. But jurists of reason could find it debatable whether the Eleventh Circuit view, as set forth in *Coates* and *Steed*, or the Sixth Circuit view, as set forth in *Abela*, ultimately is correct. A certificate of appealability properly should be issued so that petitioner can pursue the possibility of en banc or Supreme Court review of this issue. Petitioner also asserts equitable tolling, an issue that appropriately may be addressed in conjunction with the legal issue that is the subject of the circuit

split.

For the same reasons, I find that petitioner's appeal is taken in good faith, and that he therefore should be allowed to proceed in forma pauperis on appeal.

Accordingly,

IT IS ORDERED:

1. Petitioner's notice of appeal (document 10), treated as an application for a certificate of appealability, and petitioner's motion for issuance of a certificate of appealability (document 45), are GRANTED.

2. A certificate of appealability is hereby issued on the question whether the one-year limitations period applicable to a petition for writ of habeas corpus under 28 U.S.C. §2254 barred this petition, and on the legal issue whether the statute of limitations is tolled during the pendency of a petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of petitioner's earlier motion for state collateral review. *See* 28 U.S.C. §2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward any period of limitation under this subsection."); *compare, e.g., Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000), *and Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000), *with Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003) (en banc), *cert. denied sub nom. Caruso v. Abela*, 72 U.S.L.W. 3506. 2004 WL 193884 (May 24, 2004) (No. 03-

1079).

3. Petitioner's motion for appointment of counsel (document 46) is GRANTED. The appointment of Mary Catherine Bonner as attorney for petitioner is continued for purposes of appeal.

4. Petitioner's motion for leave to proceed on appeal in forma pauperis (document 47) is GRANTED.

SO ORDERED this 15th day of November, 2004.

s/Robert L. Hinkle
Chief United States District Judge

Supreme Court, U.S.
FILED
FEB 23 2006
OFFICE OF THE CLERK

No. 05-8820

IN THE
SUPREME COURT OF THE UNITED STATES

GARY LAWRENCE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

Respectfully Submitted,

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CAPITAL CASE – QUESTIONS PRESENTED (restated)

1. Whether, under 28 U.S.C. § 2244(d)(2), a state prisoner is entitled to tolling of the one-year limitation period during the time that a petition for writ of certiorari is pending following completion of collateral proceedings in the state court?

2. Whether equitable tolling of the one-year limitation period under 28 U.S.C. § 2244(d) is available where the law of the circuit unequivocally excludes tolling of the ninety-day period in which a petition for writ of certiorari could have been filed following affirmance of the denial of state collateral relief?

3. Whether equitable tolling is available based upon: actions of state-appointed collateral counsel, petitioner's low intelligence, imposition of a death sentence, or the merits of the underlying constitutional claims raised in the habeas petition?

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A. The Eleventh Circuit did not decide whether the tolling provision under 28 U.S.C. § 2244(d)(2) included the time in which a state prisoner could seek a writ of certiorari following the state court's affirmance denying state collateral relief, holding instead that a certificate of appealability should not have issued upon the claim. Even if the issue as raised may properly be considered for certiorari review, the time period is not subject to tolling under § 2244(d)(2), as the tolling provision exists to permit exhaustion of state court remedies and certiorari review from state collateral proceedings is not required to satisfy § 2254(b) 5

B. Petitioner's argument that a contrary circuit court decision provides a basis for equitable tolling -- notwithstanding unequivocal circuit precedent excluding the ninety-day period in which a petition for writ of certiorari may be filed following the state court's affirming the denial of state collateral relief -- was not presented below and thus is not subject to certiorari review. Even if reviewable and assuming that equitable tolling is available under 28 U.S.C. § 2244(d), a habeas petitioner's failure to follow circuit precedent does not constitute an extraordinary circumstance warranting equitable relief 8

C. Assuming equitable tolling is available under 28 U.S.C. § 2244(d), appointed collateral counsel's mistaken advice concerning the statute of limitations and petitioner's low intelligence do not provide proper bases for applying equitable tolling. Petitioner's reliance upon the

imposition of the death penalty and the merits of the underlying constitutional claims were not before the circuit court of appeals in considering the applicability of equitable tolling, and thus do not provide a basis for certiorari review. And even if reviewable, the same is true as to those reasons advanced for equitable tolling 10

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On Petition for Writ of Certiorari to the
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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

OPINION BELOW

Petitioner, Gary Lawrence, seeks review of the August 26, 2005 opinion of the United States Court of Appeals for the Eleventh Circuit affirming the judgment dismissing petitioner's habeas petition as time-barred, reported at Lawrence v. Florida, 421 F.3d 1221 (11th Cir. 2005). Petitioner did not seek rehearing or rehearing en banc from the Eleventh Circuit.

JURISDICTION

Petitioner is seeking jurisdiction pursuant to 28 U.S.C. § 1254(1). Although this is the appropriate provision, the requirements for granting certiorari review, as discussed, infra, have not been met.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent accepts as accurate petitioner's statement regarding the statutory provision implicated in this case.

STATEMENT OF THE CASE AND FACTS

Petitioner, Gary Lawrence, was convicted of one count of murder in the first degree, § 921.141, Fla. Stat., as well as one count each of conspiracy to commit murder, petit theft, and grand theft of a motor vehicle, obtained in the Circuit Court of Santa Rosa County, Florida. Petitioner received a sentence of death for the murder conviction. Petitioner filed a direct appeal, upon which the Florida Supreme Court affirmed his judgment of conviction and sentence on August 28, 1997. Lawrence v. State, 698 So. 2d 1219, 1220 (1997), cert. denied, 522 U.S. 1080 (1998). The facts underlying petitioner's offenses are summarized in that opinion. Id. at 1220-1221.

Petitioner subsequently sought state postconviction relief on January 19, 1999, which was denied on October 11, 2000. The state supreme court affirmed that denial on October 17, 2002. Lawrence v. State, 831 So. 2d 121 (Fla. 2002), cert. denied, 538 U.S. 926 (2003).

Petitioner filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on March 11, 2003. An amended petition was filed on petitioner's behalf by appointed counsel on September 8, 2003. Respondent filed its "Response To Order To Show Cause Why A Writ Of Habeas Corpus Should Not Be Granted" on January 12, 2004, asserting that the case should be dismissed as petitioner was time-barred pursuant to 28 U.S.C. § 2244(d) from obtaining federal habeas relief upon either the petition or amended petition, and that he was not entitled to equitable

tolling.[1] Petitioner, on March 30, 2004, filed his reply to the State's response, opposing the dismissal of his petition.

In an Order dated April 12, 2004, the district court stayed the proceedings pending the disposition of a petition for writ of certiorari in the United States Supreme Court in "*Caruso v. Abela*, 72 U.S.L.W. 3506 (Jan. 20, 2004) (No. 03-1079)." The State's request that the Order be vacated was denied on April 21, 2004. Thereafter, the State sought to appeal from the stay order on May 5, 2004; on September 2, 2004, the Eleventh Circuit Court of Appeals, in Lawrence v. State, No. 04-12348-P, dismissed the State's appeal for lack of jurisdiction. The district court subsequently dismissed the habeas petition as untimely on September 16, 2004, as this Court had denied certiorari review in Caruso v. Abela, 541 U.S. 1070 (2004).

Petitioner filed his notice of appeal to the Eleventh Circuit on October 15, 2004. The district court granted a certificate of appealability as to

> whether the one-year limitation period applicable to a petition for writ of habeas corpus under 28 U.S.C. §2254 barred this petition, and on the legal issue whether the statute of limitations is tolled during the pendency of a petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of petitioner's earlier motion for state collateral review. See 28 U.S.C. § 2244(d)(2). . . .

Appendix, Document D, at 4 (internal quotation omitted and additional citations omitted). On appeal, the Eleventh Circuit first concluded that a certificate of appealability should not have been issued on the statute of limitations issue. Lawrence, 421 F.3d at 1225. The lower court thereupon

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[1]According to Respondent's consideration of § 2244(d), the petition was due on November 19, 2002, or one day following the Florida Supreme Court's mandate affirming the denial of postconviction relief, as petitioner's conviction became final for purposes of 28 U.S.C. § 2244(d) on January 20, 1998, when this Court denied his petition for writ of certiorari, and excluding the time that his postconviction relief motion was pending -- from January 19, 1999 to November 18, 2002. The habeas petition filed on March 11, 2003, accordingly, was nearly four months late.

held that equitable tolling was neither warranted based upon conduct of counsel provided by the state nor where petitioner had an IQ of 81 and he did not allege that he was mentally incompetent and thereby incapable of complying with § 2244(d).

Respondent does not dispute that part of petitioner's contentions in his third question presented were properly raised before the Eleventh Circuit, limited to whether collateral counsel's conduct and petitioner's IQ provided a basis for equitable tolling, but disputes that Questions One, Two, and the remaining bases relied upon in Question Three are subject to review.

REASONS FOR DENYING THE WRIT

A. The Eleventh Circuit did not reach the issue whether the tolling provision under 28 U.S.C. § 2244(d)(2) includes the time in which a state prisoner may seek a writ of certiorari following the state court's affirmance denying state collateral relief, holding instead that a certificate of appealability should not have issued on the claim. Even if the issue is subject to certiorari review, the time in which certiorari can be sought from the denial of state postconviction relief is not subject to tolling under § 2244(d)(2), which exists for the purpose of permitting exhaustion of state court remedies and certiorari review from state collateral proceedings is not required to satisfy § 2254(b).

Petitioner contends that certiorari review is warranted as to the issue whether the time for which a petition for writ of certiorari from state collateral proceeding is pending is included under 28 U.S.C. § 2244(d)(2), citing the conflicting decision of the Sixth Circuit Court of Appeals in Abela v. Martin, 348 F.3d 164 (6th Cir. 2003), cert. denied, 541 U.S. 1070 (2004). Pet. at 7-8.

First, petitioner neglects to address the fact that the court below did not consider this issue, holding instead that a certificate of appealability should not have been granted thereupon because the requirements under 28 U.S.C. § 2253(c)(2) had not been met. See Lawrence, 421 F.3d at 1225 ("The district court should not have issued a COA on the statute of limitations issue because binding circuit precedent clearly disposed of the issue.... On that basis, jurists of reason would not find the timeliness issue debatable in this circuit. Thus, a COA should not have issued.") (quoting Coates v. Byrd, 211 F.3d 1225, 1227 (11th Cir. 2000), cert. denied, 531 U.S. 1166 (2001)). Accordingly, the Eleventh Circuit only considered "whether a State impediment or equitable tolling excepts the one-year filing deadline." Lawrence, 421 F.3d at 1225-1226. Thus the underlying issue is not properly before this Court, and petitioner has not challenge the lower court's determination concerning the propriety of issuance of the certificate of appealability. Compare Miller-El v.

Cockrell, 537 U.S. 322, 326-327 (2003) (addressing issue as to whether certificate of appealability was erroneously denied).

Even if the underlying issue is properly before the Court -- i.e., whether § 2244(d)(2) includes the time period in which a petition for writ of certiorari from the denial of state collateral relief is pending -- certiorari should not issue.

Pursuant to § 2244(d)(2), "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." In Carey v. Safford, 536 U.S. 214 (2002), this Court held that "an application is pending as long as the ordinary *state collateral review process* is 'in continuance'--i.e., 'until the completion of' that process. In other words, until the application has achieved final resolution *through the State's post-conviction procedures*, by definition it remains 'pending.'" Id. at 219-220 (emphasis added). Tolling under § 2244(d)(2) serves the purpose of permitting a state prisoner to exhaust his state court remedies, a requirement under § 2254(b). Exhaustion does not, however, require that a state prisoner seek discretionary review from this Court. In comparison, relative to the direct appeal of the judgment of a conviction and sentence, the time that a petition for certiorari is pending or the ninety-day period for seeking such review is relevant under § 2244(d) because it determines when a conviction and/or sentence becomes final. Caspari v. Bohlen, 510 U.S. 383, 390 (1994).[2] The Eleventh Circuit's case law is consistent with those principles, Coates, 211 F.3d at 1227, as are nearly all of the other circuit courts of appeals. See, e.g., Stokes v. District Attorney of Philadelphia, 247 F.3d 539, 542 (3rd Cir.), cert.

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[2]Such consideration obviously is pertinent to the issue of retroactivity. Teague v. Lane, 489 U.S. 288, 311 (1989).

denied, 534 U.S. 959 (2001); Crawley v. Catoe, 257 F.3d 395, 398-401 (4th Cir. 2001), cert. denied, 534 U.S. 1080 (2002); Ott v. Johnson, 192 F.3d 510, 512-513 (5th Cir. 1999), cert. denied, 529 U.S. 1099 (2000); Gutierrez v. Schomig, 233 F.3d 490, 491-492 (7th Cir. 2000), cert. denied, 532 U.S. 950 (2001); Snow v. Ault, 238 F.3d 1033, 1035-1036 (8th Cir.), cert. denied, 532 U.S. 998 (2001); Rhine v. Boone, 182 F.3d 1153, 1155-1156 (10th Cir. 1999), cert. denied, 528 U.S. 1084 (2000). The fact that the Sixth Circuit reached a different result, compare Abela, 348 F.3d at 172-173, does not provide a basis for granting certiorari review in this case -- particularly when the merits of the issue were not properly before the Eleventh Circuit and that that court recognized as much in stating that a certificate of appealability should not have issued on the issue. Lawrence, 421 F.3d at 1225. Thus petitioner's discussion of the merits of the claim, then, including the reasoning of the various courts of appeals that have addressed the issue, see Pet. at 7-13, is simply an invitation for this Court to render an advisory opinion.[3]

Based upon the foregoing discussion, the Court should not exercise its jurisdiction to consider this issue now raised for the first time. See Schiro v. Farley, 510 U.S. 222, 228 (2001) (the Court "ordinarily do[es] not review claims made for the first time in this Court . . . ."); Heath v. Alabama, 474 U.S. 82, 87 (1985); Berkemer v. McCarty, 468 U.S. 420, 443 (1984). In addition, certiorari is not warranted. Rules of the Supreme Court of the United States, Rule 10.

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[3]Moreover, because petitioner filed his federal habeas petition on March 11, 2003 -- prior to this Court's disposition on March 24, 2003 of his petition for writ of certiorari from the Florida Supreme Court's opinion affirming the denial of postconviction relief -- one must question the basis for any purported reliance by petitioner on § 2244(d)(2).

B. Petitioner's argument that a contrary circuit court decision provides a basis for equitable tolling -- notwithstanding unequivocal circuit precedent excluding the ninety-day period in which a petition for writ of certiorari may be filed following the state court's affirming the denial of state collateral relief -- was not presented below and thus is not subject to certiorari review. Even if reviewable and assuming that equitable tolling is available under 28 U.S.C. § 2244(d), a habeas petitioner's failure to follow circuit precedent does not constitute an extraordinary circumstance warranting equitable relief.

Petitioner contends that certiorari review is warranted as to the issue whether equitable tolling is available under § 2244(d)(2) based upon a so-called "lack of clarity in the relevant law" and his unsupported conclusory belief that his "strategic choices regarding Section 2244(d)(2) statute of limitations period were reasonable . . . ." Pet. at 14.[4]

In essence, petitioner urges this Court to consider his claim that equitable tolling should preclude the running of the limitation period for federal habeas corpus review when a state prisoner relies upon an out-of-circuit appellate decision in determining when the petition is due, notwithstanding governing circuit precedent that is to the contrary. Pet. at 14-15. Petitioner fails, however, to address the fact that that precise issue was neither presented to nor decided by the Eleventh Circuit. Compare Lawrence, 421 F.3d at 1226 (". . . Lawrence posits that the State's provision to him of an incompetent attorney justifies the imposition of equitable tolling. . . . Lawrence also contends that his mental incapacity prevented him from timely filing and justifies the invocation of equitable tolling.").

In addition, while petitioner contends that he was diligent, he makes no effort to demonstrate or otherwise explain his failure to follow governing case law, instead relying upon an alleged split

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[4]As referenced supra, at 7 n.3, one must question petitioner's assertion that he made a strategic choice as to when to file his habeas petition due to conflicting case law, given the fact that he filed that petition prior to this Court's disposition of the request for certiorari review from the state collateral proceedings.

in the circuits. See Pet. at 7-8, 14-15. Even if reviewable, petitioner's claim for equitable tolling must fail, as the alleged split did not exist at the time that his federal habeas petition was due on November 19, 2002. Indeed, Abela was not even argued until March 26, 2003, and in being decided on October 22, 2003, was nearly seven months after petitioner untimely filed his habeas petition on March 11, 2003. Thus at the time his petition was due, every circuit that had considered the issue -- including the Sixth Circuit -- had held in accord with the proposition that the ninety-day period to seek certiorari review from a state collateral proceeding was not tolled under § 2244(d)(2). See, e.g., Stokes, 247 F.3d at 542; Crawley, 257 F.3d at 398-401; Ott, 192 F.3d at 512-513; Isham v. Randle, 226 F.3d 691, 695 (6th Cir.), cert. denied, 531 U.S. 1201 (2001); Gutierrez, 233 F.3d at 491-492; Snow, 238 F.3d at 1035-1036; Rhine, 182 F.3d at 1155-1156.

Based upon the foregoing discussion, the Court should not exercise its jurisdiction to consider this issue now raised for the first time. See Schiro, 510 U.S. at 228; Heath, 474 U.S. at 87; Berkemer, 468 U.S. at 443. Moreover, certiorari is not warranted under Rule 10 of the Rules of the Supreme Court of the United States.

C. Assuming equitable tolling is available under 28 U.S.C. § 2244(d), appointed collateral counsel's mistaken advice concerning the statute of limitations and petitioner's low intelligence do not provide proper bases for applying equitable tolling. Petitioner's reliance upon the imposition of the death penalty and the merits of the underlying constitutional claims were not before the circuit court of appeals in considering the applicability of equitable tolling, and thus do not provide a basis for certiorari review. And even if reviewable, the same is true as to those reasons advanced for application of equitable tolling.

Finally, petitioner argues that as the result of state collateral counsel's mistaken advice, his own low intelligence[5], the fact that he was sentenced to death, and the merits of the underlying constitutional claim, equitable tolling should excuse his untimely habeas petition. Pet. at 16.

Petitioner's reliance upon collateral counsel's conduct in seeking to avail himself of equitable relief fails to acknowledge or otherwise recognize that Congress expressly precluded relief premised upon the conduct of postconviction or collateral counsel. 28 U.S.C. § 2254(i). That provision does not contain an exception for invoking collateral counsel's conduct to excuse an untimely petition. Nor did petitioner make any attempt below to demonstrate that appointed counsel precluded him from ascertaining the date which his petition was due. Petitioner also fails to point to any circuit courts of appeals' decision that treats an attorney's mistaken advice as an extraordinary circumstance excusing an untimely habeas petition. To the contrary, the circuits are in accord that such does not constitute an extraordinary circumstance. See, e.g., Smaldone v. Senkowski, 273 F.3d 133, 138-139 (2nd Cir. 2001), cert. denied, 535 U.S. 1017 (2002); Johnson v. Hendricks, 314 F.3d 159, 162-163 (3rd Cir. 2002), cert. denied, 538 U.S. 1022 (2003); Harris v. Hutchinson, 209 F.3d 325, 330-331 (4th Cir. 2000); Jurado v. Burt, 337 F.3d 638, 644-645 (6th Cir. 2003); Taliani v. Chrans, 189 F.3d 597 (7th Cir. 1999); Kreutzer v. Bowersox, 231 F.3d 460, 463 (8th Cir. 2000), cert. denied, 534 U.S.

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[5]Petitioner has repeatedly referred to himself, in this Court and below, as "nearly retarded." See, e.g., Pet. at 16. As the record bears out, however, petitioner has an IQ of 81.

863 (2001); Miranda v. Castro, 292 F.3d 1063, 1067-1068 (9th Cir.), cert. denied, 537 U.S. 1003 (2002); Helton v. Secr. for the Dept. of Corrections, 259 F.3d 1310, 1313 (11th Cir. 2001), cert. denied, 535 U.S. 1080 (2002).

Next, petitioner relies upon his low intelligence as a basis for equitable tolling. Petitioner did not assert and thereupon establish that mental incapacity rendered him incapable of timely filing the petition, and without more, no court has applied the rule petitioner seeks. See, e.g., Green v. Hinsley, 116 Fed. Appx. 749, 751 (7th Cir. 2004) (unpublished).

Petitioner also urges this Court to accept certiorari review on the basis that he is under a sentence of death. Pet. at 15. The Eleventh Circuit did not address this argument, as it was not presented below. In any event, petitioner's "death is different" argument ignores the fact that Congress did not make an exception to the limitation period in death cases and is contrary to the very purpose behind the enactment of AEDPA -- i.e., to curtail the endless delay in capital cases. Indeed, the statutory scheme itself evinces such intent: in cases where a state has opted in under 28 U.S.C. § 2261, the limitation period is sixth months in length, and similarly does not include a provision for equitable tolling. And the circuit courts of appeal that have considered the application of § 2244(d) in capital cases have rejected the notion that equitable tolling should be evaluated more leniently where a sentence of death has been imposed as compared to a term of years. See e.g., Rouse v. Lee, 339 F.3d 238, 253-256 (4th Cir. 2003) (en banc); Fierro v. Cockrell, 294 F.3d 674, 684 (5th Cir. 2002), cert. denied, 538 U.S. 947 (2003); Johnson v. McBride, 381 F.3d 587, 590-591 (7th Cir. 2004), cert. denied, 125 S.Ct. 1649 (2005); see also Kreutzer, 231 F.3d at 463 (no special consideration applied in capital case); but see Fahy v. Horn, 240 F.3d 239, 245 (3rd Cir.) (allowing less than "'extraordinary circumstances' to trigger equitable tolling of the AEDPA's statute of

limitations *when a petitioner has been diligent* in asserting his or her claims and rigid application of the statute would be unfair."in capital cases,") (emphasis added), cert. denied, 534 U.S. 944 (2001). Petitioner's reliance upon Fahy is not well taken, see Pet. at 13-15, as he neglects to address the fact that here petitioner did not act reasonably or with due diligence in light of the governing circuit precedent that unequivocally rejected the ninety-day period for which certiorari could be sought from the denial of relief in a state postconviction proceeding as subject to tolling under § 2244(d)(2). Compare Fahy, 240 F.3d at 244, 245 ("Fahy delayed filing his federal habeas petition because he believed he was required to pursue a fourth petition for collateral relief in state court. At the time Fahy made this ill-advised choice, he reasonably believed that the state petition was properly filed. The Pennsylvania Supreme Court eventually disagreed, but the filing period for Fahy's federal habeas petition had run by the time the Court ruled."; "[A]t the time Fahy filed his fourth PCRA petition Pennsylvania law was unclear on the operation of the new PCRA time limit. . . . If we could not predict how the Pennsylvania court would rule on this matter, then surely we should not demand such foresight from the petitioner. Fahy's misjudgment, therefore, was reasonable.").

Finally, petitioner contends that this Court should consider "the potential merits of the substantive claim barred under a statute of limitations." Pet. at 15; id. at 16. While petitioner contends that "other courts" have looked to the underlying claim in deciding whether to excuse an untimely petition, Pet. at 15-16, he relies upon inapposite case law. In respect to his citation to Drew v. Dept. of Corrections, 297 F.3d 1278 (11th Cir. 2002), cert. denied, 537 U.S. 1237 (2003), as petitioner acknowledges, Pet. at 15, he relies upon, quoting, a dissenting opinion. See Drew, 297 F.3d at 1294. Nor is Justice v. United States, 6 F.3d 1474 (11th Cir. 1993), see Pet. at 16 n.15, on

point. There, application of a statute of limitations arose in a case brought under the Public Vessels Act, 46 U.S.C.App. §§ 781-90 (1988) (PVA) and the Suits in Admiralty Act, 46 U.S.C.App. §§ 741-52 (1988) (SAA). Obviously, proceedings brought under 28 U.S.C. § 2254, where a state prisoner is challenging the constitutionality of his state judgment of conviction and sentence, implicate completely different interests than when a civil suit is brought in the first instance. Moreover, Justice does not stand for the proposition urged by petitioner. Compare id., 6 F.3d at 1479 ("[C]ourts, acting in their equitable capacity, will toll statutes of limitations, but 'only upon finding an inequitable event that prevented plaintiff's timely action.'"). In Murray v. Carrier, 477 U.S. 478 (1986), also relied upon by petitioner, see Pet. at 16 n.15, this Court considered what constituted "cause" upon which a federal district court, with the proper showing of prejudice, could thereupon reach the merits of a constitutional claim raised in a habeas petition that was procedurally defaulted in state court. Id. at 481-482. While petitioner cites Justice Stevens' concurrence in Murray, he fails to recognize that not only is that a pre-AEDPA case -- i.e., before the enactment of a statute of limitations in habeas actions -- but also that this Court did not then and has not since, adopted the rule that a procedural basis for denying habeas relief is subject to merits' consideration. The same is true concerning petitioner's citation to Hensley v. Municipal Court, 411 U.S. 345 (1973). See Pet. at 16 n.15.

Based upon the foregoing discussion, certiorari is not warranted under Rule 10 of the Rules of the Supreme Court of the United States.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny petitioner's request for certiorari review.

Respectfully Submitted,

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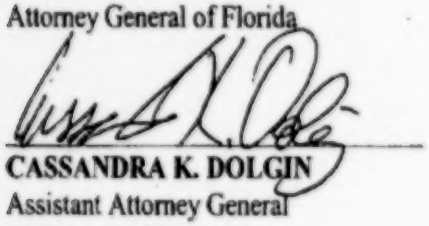
Attorney General of Florida



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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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CAPITAL CASE

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers as *amicus curiae* in support of petitioner.[1]

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization with direct national membership of over 10,000 attorneys and more than 28,000 affiliate members from every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. In connection with that mission, NACDL has frequently filed *amicus curiae* briefs in this Court in cases involving the application of the Anti-terrorism and Effective Death Penalty Act (AEDPA) in an effort to further NACDL's substantial interest in ensuring that criminal defendants are able to take advantage of both the state and federal post-conviction review processes. *See, e.g., Rhines v. Weber*, 544 U.S. 269

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel contributed monetarily to the brief.

(2005); *Gonzalez v. Crosby*, 125 S. Ct. 2641 (2005); *Dodd v. United States*, 545 U.S. 353 (2005); *Pliler v. Ford*, 542 U.S. 225 (2004).

SUMMARY OF ARGUMENT

An "application for State post-conviction or other collateral review" is "pending" under AEDPA, *see* 28 U.S.C. § 2244(d)(2), while this Court is deciding whether to grant certiorari review of that very application. As petitioner explains, a state habeas petition invoking federal law is not decided—and thus remains "pending"—until this Court has decided whether to grant certiorari review.

Although we agree with petitioner that the text and legislative history of AEDPA do not and cannot support the decision of the court of appeals, we write separately to address two related but additional points. First, even if the statute were unclear, any ambiguity should be resolved in petitioner's favor. Since the Founding, state-court decisions implicating federal questions have always been subject to review and reversal by this Court. As a result, state actions involving federal law are not final—and are thus still "pending—until this Court has had the chance to rule. Nothing in the text or the legislative history of section 2244(d)(2) indicates an intent on the part of Congress to depart from this traditional understanding. On the contrary, the text and legislative history cement the conclusion that Congress intended to follow the historical rule.

Second, there is no policy-based justification under AEDPA for interpreting section 2244(d)(2) to exclude the time in which state habeas applications are subject to this Court's review. Because this Court determines the time period during which petitions seeking certiorari review are resolved, there is no risk that construing section 2244(d)(2) to comport with the traditional rule will lead to abuse or undue delay in the habeas process. In fact, it is the State's contrary

position that contravenes AEDPA's principles by inviting conflict between the state and federal judicial systems as prisoners are forced to file precautionary federal habeas petitions while their *state* habeas petitions are still awaiting final determination by this Court. The result will be confusion and a needless waste of party and judicial resources, as federal district courts are forced to contend with a flood of precautionary petitions and requests for stays pending the outcome of Supreme Court review.

ARGUMENT

I. THE DECISION BELOW IS CONTRARY TO THE PLAIN TEXT AND LEGISLATIVE HISTORY OF THE STATUTE, AND IGNORES THIS COURT'S HISTORIC EXERCISE OF JURISDICTION OVER STATE-COURT DECISIONS.

Section 2244(d)(2) tolls AEDPA's one-year limitations period during the time that a "properly filed application for State post-conviction or other collateral review . . . is pending." 28 U.S.C. § 2244(d)(2). The court of appeals erred in holding that an application for State post-conviction review invoking federal law is not "pending" while this Court decides whether to grant certiorari review over a state-court decision denying that application.

A. The Eleventh Circuit's Analysis of Section 2244(d)(2)'s Language Is Flawed.

1. The court of appeals based its decision on a purported difference between two provisions of AEDPA: section 2244(d)(2) and section 2244(d)(1)(A). *See Lawrence v. Florida*, 1221, 1225 (11th Cir. 2005) (*citing Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000)). As noted, the former provision—the provision at issue in this case—tolls AEDPA's one-year statute of limitations while a properly filed state habeas petition "is pending." 28 U.S.C. §

2244(d)(2). The latter provision, which the Eleventh Circuit incorrectly referred to as "the provision applicable to tolling during direct appeal," *Coates*, 211 F.3d at 1226, is not a tolling provision at all but instead describes when the limitations period begins to run. *See* 28 U.S.C. § 2244(d)(1)(A). It states that the one-year statute of limitations for filing a habeas petition begins to run, among other possible triggering events, on the date on which the underlying state-court judgment "became final by the conclusion of direct review." *Id.* The court of appeals reasoned that because a judgment against a prisoner "becomes final" only upon the conclusion of this Court's review on direct appeal, Congress's omission of the identical language from section 2244(d)(2) suggests that Congress meant to exclude from the tolling provision this Court's review of applications for state post-conviction relief. *See Coates*, 211 F.3d at 1226-27.

The court of appeals' reasoning is incorrect. Although language appearing in one provision of a statute but not another may in some cases suggest that Congress intended to exclude that language from the latter provision, *see Russello v. United States*, 464 U.S. 16, 23 (1983), no cannon of statutory construction requires a court to decide that *any* difference in the language of distinct provisions of a statute necessarily means that Congress intended them to have *opposite* meanings. In *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424 (2002), this Court refused to invoke the *Russello* cannon of construction because doing so would have resulted in an interpretation of the statute that read the language too "restrictively." *Id.* at 435. As *City of Columbus* makes clear, the mere fact that two provisions in a statute are worded differently does not *ipso facto* mean they have opposite meanings. Rather, courts must be deliberate when applying the *Russello* presumption and must remain mindful of the overall statutory scheme in interpreting the meaning of any one particular provision.

The court of appeals failed to do so in this case. Instead of engaging in a rigorous analysis of the words Congress used in the context of the overall statutory scheme, the court of appeals essentially punted, simply *assuming* that the linguistic difference between sections 2244(d)(2) and 2244(d)(1)(A) showed that Congress intended antithetical meanings. *Coates*, 211 F.3d at 1226. But that is not remotely the only (or even the best) logical inference to draw from the statutory language. These two provisions can much more sensibly be read together as stating that an application for state habeas relief is "pending" until the decision denying that application is "final." After all, the word "pending" means "[n]ot yet decided or settled; awaiting conclusion or confirmation." American Heritage Dictionary 1299 (4th ed. 2000). Indeed, this Court has expressly held as much with regard to this very provision of AEDPA. *See Carey v. Saffold*, 536 U.S. 214, 219 (2002) (indicating that the words "is pending" in section 2244(d)(2) mean "not yet decided."). And, as the court of appeals agreed, a state-court decision involving a federal question is not "final"—*i.e.* is "not yet decided"—until this Court has decided whether to take jurisdiction over the case. *See Coates*, 211 F.3d at 1226; *see also infra* at 7-11. Thus, under the plain meaning of the statute and this Court's precedent in *Carey*, an application for State post-conviction review is "pending" until a decision denying that application is *final*, which occurs only when this Court has decided whether to grant certiorari review. This reading of the statute harmonizes the two provisions' shared use of the concept of finality, rather than presuming that a slight distinction in their language suggests they have diametrically opposite meanings.

Indeed, there is no reason to believe that Congress intended the word "pending" to exclude altogether the concept of finality expressed in section 2244(d)(1)(A). The linguistic distinction between "is pending" and "became final" instead

most likely reflects nothing more than the different subjects of the two subsections. The subject of section 2244(d)(1)(A) is a "judgment," which this Court has held "becomes final" when it concludes its direct review. *See Clay v. United States*, 537 U.S. 522, 527-28 (2003). The subject of section 2244(d)(2), in contrast, is an "application for post-conviction or other collateral review." And an *application* does not "become final"; rather, it is "granted," "denied," "dismissed," or the like. Read in light of the pertinent subjects set forth in sections 2244(d)(1)(A) and 2244(d)(2), the linguistic difference relied on by the court of appeals does not indicate that Congress intended "becomes final" and "is pending" be interpreted differently; those phrases are merely a product of the different subjects of the two subsections: a "judgment" and an "application." *Cf. City of Columbus*, 536 U.S. at 435-36 ("The *Russello* presumption—that the presence of a phrase in one provision and its absence in another reveals Congress' design—grows weaker with each difference in the formulation of the provisions under inspection.").

2. The court of appeals' decision to place load-bearing emphasis on section 2244(d)(1)(A) is also misplaced because section 2244(d)(2) tolls AEDPA's one-year limitations period while a state habeas petition is "pending," not while it is "pending *in State court*." *Compare* 28 U.S.C. § 2244(d)(2) *with Coates*, 211 F.3d at 1227 (holding that application is pending "only so long as the case *is in the state courts*") (emphasis added). In fact, the court overlooked a more suitable linguistic comparison that provides a better indication of Congress's intent. As noted above, the court of appeals wrongly described section 2244(d)(1)(A) as "the provision applicable to tolling during direct appeal." *Coates*, 211 F.3d at 1226. There *is*, however, another tolling provision in AEDPA. Section 2263(b)(2), which is part of AEDPA's so-called "opt-in" provisions for capital cases, tolls the statute of limitations while prisoners exhaust their state remedies—

just as section 2244(d)(2) does for prisoners in states that do not follow the opt-in requirements. But unlike section 2244(d)(2), the language of section 2263(b)(2) states that the time for seeking certiorari in this Court after the denial of post-conviction relief by the state's highest court should *not* be tolled:

> The time requirements established by subsection (a) shall be tolled . . . from the date on which the first petition for post-conviction review or other collateral relief is filed until the final *State court disposition* of such petition . . . .

28 U.S.C. § 2263(b) – (b)(2) (emphasis added). This language provides a far more relevant basis for comparison than does section 2244(d)(1)(A). Accordingly, to the extent that the *Russello* rule of construction applies here, it favors petitioner's reading of the statute.

B. Section 2244(d)(2) Should Be Read In Light of This Court's Time-Honored Role Within the State Appellate Process.

But perhaps the most fundamental error in the decision of the court of appeals was its failure to read section 2244(d)(2) in a manner consistent with centuries of traditional practice and understanding. A bedrock principle of American federalism is that, because state courts are authorized to decide questions of federal law, any such state-court decisions are subject to certiorari review by this Court. *See, e.g.*, Felix Frankfurter & James M. Landis, *The Business of the Supreme Court* 4 (1927) (describing the Supreme Court's appellate jurisdiction over state courts as "one of the most important nationalizing influences in the formative period of the Republic."). Respondent has not shown (and cannot show) that, in drafting the language of section 2244(d)(2), Congress intended to deviate from that traditional understanding. Accordingly, even if section 2244(d)(2) were oth-

erwise ambiguous, it would be appropriate to assume that Congress intended to incorporate into section 2244(d)(2) this Court's traditional and consistent understanding that a state-court decision is not final—and thus remains pending—until this Court has itself either declined review or decided the case on the merits.

1. The Framers believed that state-court enforcement of national law was fundamental to the federal system they created:

> When . . . we consider the state governments and the national governments as they truly are, in the light of kindred systems and as parts of ONE WHOLE, the inference seems to be conclusive that the state courts would have a concurrent jurisdiction in all cases arising under the laws of the union, where it was not expressly prohibited.

The Federalist No. 82, at 555 (Alexander Hamilton) (J.E. Cooke ed., 1961); *see also Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 n.4 (1981) ("Permitting state courts to entertain federal causes of action facilitates the enforcement of federal rights."). It was repeatedly affirmed in the early years of the Republic that "the constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 342 (1816); *see also Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) ("we have consistently held that state courts have inherent authority . . . to adjudicate claims arising under the laws of the United States.").

But as the Framers recognized, this principle could not be effectuated unless there was also a mechanism to ensure uniformity in the enforcement of federal law. They therefore vested this Court with appellate jurisdiction over state-court decisions implicating federal law or the Constitution. *See* The Federalist No. 82, at 555 ("what relation would subsist

between the national and state courts in these instances of concurrent jurisdiction? I answer that an appeal would certainly lie from the latter to the supreme court of the United States."); *see also* Judiciary Acts, 1 Stat. 73, 85-86 (1789) (giving this Court appellate jurisdiction over state courts in certain types of cases); Frankfurter & Landis, *The Business of the Supreme Court* 13 ("[The Supreme Court's] appellate jurisdiction was fed by two streams, one running from the lower federal courts, the other from the state courts.").

By the early nineteenth century, this Court had affirmed its prerogative to review state-court decisions raising federal questions. *See, e.g., Martin*, 14 U.S. (1 Wheat.) at 342 (the "very terms of the constitution" compel the conclusion that "the appellate power of the United States . . . extend[s] to state tribunals."). And over the last two centuries, this Court has consistently reaffirmed that principle. *See, e.g., McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation of Fla.*, 496 U.S. 18, 29 (1990) ("the exercise of jurisdiction by state courts over cases encompassing issues of federal law is subject to two conditions: State courts must interpret and enforce faithfully the 'supreme Law of the Land,' and their decisions are subject to review by this Court." (footnote omitted)); *Gulf Offshore*, 453 U.S. at 478 n.4 ("state courts stand ready to vindicate . . . federal right[s], subject always to review, of course, in this Court."). This Court has also recognized the importance of that principle to the federal system, emphasizing "the necessity of an appellate power in the Federal judiciary to revise the decisions of State courts in cases arising under the Constitution and laws of the United States, in order that the constitutional grant of judicial power . . . may have full effect." *Claflin v. Houseman*, 93 U.S. 130, 142 (1876); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 415 (1821) (Marshall, C.J.) ("The exercise of the appellate power over those judgments of the State tribunals which may contravene the constitution

or laws of the United States, is, we believe, essential . . . ."); *see also generally* Martin H. Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study In Interactive Federalism*, 19 Ga. L. Rev. 861, 864 (1985) (concluding that an expansive view of the Supreme Court's jurisdiction to review state-court decisions that touch upon federal law is "a proper application of accepted theoretical principles of American federalism."). Thus, for more than two hundred years, the Supreme Court has stood as the highest "court of *appeal* from the State courts." *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 613 (1874).

It follows that a state-court decision involving federal or constitutional matters is ordinarily not final—in the sense of being beyond alteration—unless this Court has had, or has foregone, the opportunity to reverse or modify the decision. *See, e.g., Caspari v. Bohlen*, 510 U.S. 383, 390 (1994) (holding that a state-court decision is final when the "time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied"); *McKesson Corp.*, 496 U.S. at 31 n.12 ("'[T]he plaintiffs' claim is one arising under the Federal Constitution and, consequently, one on which the opinion of the state court is not final.'") (quoting *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 681 (1930)). For instance, in *Robb v. Connolly*, 111 U.S. 624 (1884)—which involved a petition for habeas relief filed in this Court—Justice Harlan noted that state-court decisions that allegedly violate the Constitution lack a certain degree of finality: "If [state courts] . . . withhold or deny rights, privileges, or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided to this court *for final and conclusive determination*." *Id.* at 637 (emphasis added).

2. Under established principles of statutory construction, the long-standing view that the Supreme Court is the

highest court of appeal in the state appellate system (at least with respect to federal questions) should be read into section 2244(d)(2). *See Clay*, 537 U.S. at 527 ("th[is] Court presumes 'that Congress expects its statutes to be read in conformity with this Court's precedents . . . .'" (quoting *United States v. Wells*, 519 U.S. 482, 495 (1997). In other words, it is presumed that Congress legislates within the legal framework established by this Court and incorporates this Court's pronouncements on rules, judicial procedures, and statutory and constitutional meaning into every statute it enacts.

Instead of reading section 2244(d)(2) with historical practice in mind, the court of appeals ignored the unbroken line of cases in which this Court has expounded the importance of its jurisdiction to review state-court decisions that implicate federal law. As a result, the court of appeals effectively read this Court's role out of the state post-conviction review process, losing sight of the fact that "the time-honored practice of appellate review of state-court judgments [is] consistent with this Court's role in our federal system." *McKesson*, 496 U.S at 28. This error, as well as the errors in its linguistic analysis, reveal that the decision of the court of appeals is incorrect and should be reversed.

II. THE DECISION OF THE COURT OF APPEALS IS CONTRARY TO THE PRINCIPLES UNDERLYING AEDPA.

In addition to reflecting longstanding historical practice, petitioner's proposed construction of section 2244(d)(2) is preferable to the court of appeals' interpretation because it is more consistent with AEDPA's underlying principles. Tolling AEDPA's limitations period during the time that state habeas petitions are being considered by this Court furthers comity and avoids conflict between federal and state judicial systems, and it also promotes the efficient use of party and court resources. The rule endorsed by the court of appeals,

by contrast, would do none of these things. As a result, it would undermine rather than further the purposes of AEDPA.

1. This Court has noted that, in considering competing constructions of an AEDPA provision, it is important to view the relevant provision in light of, among other interests, "AEDPA's purpose to further the principles of comity, finality, and federalism." *Duncan v. Walker*, 533 U.S. 167, 178 (2001) (quoting *Williams v. Taylor*, 529 U.S. 362, 436 (2000)). As this Court has held, it would be inconsistent with those interests for federal courts to upset state convictions before state remedies have run their course. *Duncan*, 533 U.S. at 179-80.

Yet such inter-system conflict is precisely what will occur if the court of appeals' approach is ratified by this Court. In the Eleventh Circuit, state prisoners who wish to exhaust all their available remedies now face a choice following the denial of state habeas relief by the state court of last resort. First, they may file a petition for certiorari with this Court and wait as long as possible for its disposition prior to filing their initial federal habeas petition. Second, they may file a petition for certiorari with this Court and simultaneously or soon thereafter file a petition for federal habeas relief under 28 U.S.C. § 2254. Either scenario is unfair, inefficient, and contrary to AEDPA's purposes.

a. *Waiting.* For prisoners who choose, in deference to this Court, to wait as long as possible for its ruling on their petitions, there is a substantial risk that the opportunity to file federal habeas petitions will be lost altogether. The process of petitioning for certiorari before this Court typically takes more than three months. *See* Sup. Ct. R. 13.1 (petition must be filed within 90 days of entry of judgment by state court of last resort). Given that a petitioner has a year to file a federal habeas petition, and given that some of that time will almost always be lost at other stages of the federal and state habeas

processes, waiting for this Court's resolution of a petition for certiorari—when the time spent waiting is not tolled—can easily push even the most well-intentioned state prisoner over the one-year limit.

The court of appeals' only answer to that problem was that "[e]ach delay, for its span, is a commutation of a death sentence to one of imprisonment." *Lawrence*, 421 F.3d at 1225 n.1 (quoting *Thompson v. Wainwright*, 714 F.2d 1495, 1506 (11th Cir. 1983)). That analyis completely overlooks the state prisoner's own substantial interest in actually obtaining federal habeas review, which as a practical matter will often be the only real opportunity to receive meaningful review by a federal court of a state conviction. *Cf. Duncan*, 533 U.S. at 191 (Breyer, J., dissenting) (noting that the purpose of AEDPA is "to grant state prisoners a fair and reasonable time to bring a first federal habeas corpus petition"). Under the court of appeals' rule, the ability to secure federal review might depend on how quickly this Court can dispose of petitions for certiorari from state court denials of state collateral review, a process that state prisoners of course "have no way of controlling." *Rhines v. Weber*, 544 U.S. 269, 275 (2005). And given the fact that it is the Court, and not the prisoner, who controls the certiorari clock, any concern that capital petitioners will engage in dilatory tactics is misplaced.

Just as important is that the court of appeals' rule would apply, of course, to non-capital petitioners as well as capital petitioners. Any delay in the post-conviction relief process for non-capital petitioners results in no "commutation" of sentence. On the contrary, non-capital petitioners—who constitute the vast majority of habeas petitioners—have no incentive whatsoever to engage in dilatory tactics. For them, the point is to move as quickly as possible toward potential relief. In that substantial majority of cases, the state interest

in finality and the prisoner's interest in speedy review (indeed, in *any* federal review) are precisely coterminous.

b. *Multiple simultaneous filings.* The course more likely to be taken by state prisoners is fraught with even greater difficulties. Under the court of appeals' approach, risk-averse state prisoners (including those represented by counsel) would in most circumstances take the precaution of filing federal habeas petitions early and simply asking district courts to stay their petitions pending this Court's disposition of their petitions for certiorari—thereby securing on an *ad hoc* basis the exact same arrangement that petitioner's proposed interpretation would more formally provide.

The difference, however, is that petitioner's position is far more efficient—it would avoid the needless litigation and potential friction between various courts inherent in the court of appeals' approach. If state habeas petitioners concerned about AEDPA's time limits are compelled to file "precautionary" federal habeas petitions while certiorari petitions are still pending before this Court, district courts will be required to entertain motions to stay those petitions pending this Court's resolution of the certiorari petition. As this Court has explained, "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also Arkadelphia Milling Co. v. St. Louis Sw. Ry. Co.*, 249 U.S. 134, 146 (1919) (power to stay proceedings is "inherent in every court"); *Clinton v. Jones*, 520 U.S. 681, 683 (1997) (district court has "broad discretion to stay proceedings as an incident to control of its own docket"). Moreover, this Court has held that district courts would have discretion to entertain such motions to stay in other contexts. *See, e.g., Rhines*, 544 U.S. at 276-77 (holding that district courts may stay partially unexhausted petitions pending exhaustion).

No choice is a good one for a district court confronted by such a situation. If a district court chooses, on one hand, to stay a petition, the court of appeals' rule will accomplish nothing while at the same time amounting to a wildly inefficient procedure and a dependable source of collateral litigation and docket crowding. If a district court chooses instead not to stay a petition, it risks "unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." *Rose v. Lundy*, 455 U.S. 509, 515 (1982) (quoting *Ex parte Royall*, 117 U.S. 241, 251 (1886)). In particular, it risks clashing with this Court's decision in some cases to grant review of—or grant some other relief concerning—a state habeas petition. This Court could grant certiorari over a state habeas petition and reverse the judgment of a state court, remanding the case for further review while a federal application is *already* moving forward in federal district court. The district court would then be confronted with a difficult and awkward question of how to proceed, particularly if it had already granted some form of relief.[2] *See Duncan*, 533 U.S. at 179 (noting that it would be "unseemly in our dual system of government" for a federal district court to upset a state court conviction whose validity was being considered in state court) (quotation omitted). The court of appeals' rule thus works against AEDPA's underlying interests and invites conflict between sovereigns.[3]

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[2] Federal courts entertaining a federal habeas petition have the power to stay related state-court proceedings under 28 U.S.C. § 2251.

[3] It is true that the Eleventh Circuit's rule will encourage state prisoners who choose this path "'to file their federal habeas petitions more quickly.'" *Duncan*, 533 U.S. at 181 (quoting appellate court's decision). But as this Court concluded in *Duncan*, federal courts should not slavishly pursue that interest at the expense of full deference to state review. *Cf. id.* ("Section 2244(d)(1)'s limitation period and § 2244(d)(2)'s tolling provision, together with § 2254(b)'s exhaustion requirement, encourage

This is not mere conjecture. At least one federal district court has already confronted this issue. *See Coleman v. Davis*, 175 F. Supp. 2d 1109, 1109-11 (N.D. Ind. 2001) (confronting the problem of "simultaneous review of the same Indiana Supreme Court decision by both the United States Supreme Court and this court" when the Supreme Court had vacated the final judgment of a state court on state-post-conviction relief, and employing "retroactive tolling" as the *deus ex machina* to avoid it); *see also Abela v. Martin*, 348 F.3d 164, 172 (6th Cir. 2003) (en banc) (criticizing retroactive tolling and observing that a "statute of limitations should be clear").

Quite apart from those problems, the path of multiple simultaneous filings offers a distinct set of practical complications for petitioners and courts alike. In addition to having to confront the strategic choices already outlined, habeas petitioners will also face significant logistical barriers to filing their petitions in federal court, because neither state nor federal procedural rules are designed to accommodate multiple simultaneous filings. The rules of procedure governing section 2254 applications, for example, contemplate the availability of transcripts and exhibits that will have formed part of the record in state proceedings. *E.g.*, Rules Governing Section 2254 Cases, Rule 4, 1976 advisory committee notes (consideration of habeas petition "may properly encompass any exhibits attached to the petition, including, but not limited to, transcripts, sentencing records, and copies of state court opinions. The judge may order any of these items for his consideration if they are not yet included with the petition"); 28 U.S.C. § 2254(g) (certified state records admissible in federal proceedings). But while certiorari petitions are pending, this Court's rules provide that the "clerk of the

---

litigants *first* to exhaust all state remedies and *then* to file their federal habeas petitions as soon as possible.").

court having possession of the record shall keep it until notified by the Clerk of this Court to certify and transmit it." Sup. Ct. R. 12, ¶ 7. Thus, state prisoners who file federal habeas petitions while awaiting this Court's disposition of their certiorari petitions following the denial of post-conviction relief in state courts will likely encounter resistance from those courts when trying to transfer their records to federal district court. These petitioners will be needlessly hampered in their efforts to present evidence in support of their petitions in federal court.

2. Finally, it bears reiterating that petitioner's interpretation creates no opportunity for abuse of the writ. Under the rule urged by petitioner, AEDPA's one-year statute of limitations would continue to toll while this Court considers a petition for certiorari following state post-conviction review. A habeas petitioner would thus be under no pressure to file a federal petition prior to this Court's disposition of the certiorari petition. If the Court denied the petition, the clock would start ticking on federal habeas relief. If it granted certiorari and ultimately remanded the case to state court, it could do so without any risk of conflict with ongoing federal habeas proceedings. State post-conviction proceedings would resume without any complicated tolling question—the one-year statute of limitations would continue to toll. For federal and state courts, attorneys, and *pro se* habeas petitioners alike, petitioner's rule would thus be clearly marked and tolling questions easy to answer.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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June 26, 2006

Supreme Court, U.S.
FILED
JUL 26 2006
OFFICE OF THE CLERK

(1)

No. 05-8820

IN THE

Supreme Court of the United States

GARY LAWRENCE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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June 26, 2006

PETITION FOR CERTIORARI FILED JANUARY 23, 2006
CERTIORARI GRANTED MARCH 27, 2006

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U.S. DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA—
District Version 2.5 (Pensacola)

[Filed 03/11/2003]

Civil Docket For Case #: 3:03-cv-00097-RH

GARY LAWRENCE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
03/11/2003	1	PETITION for writ of habeas corpus; -state habeas 28:2254 (tnc,Pensacola) (Entered: 03/13/2003)
03/11/2003	2	MOTION by petitioner GARY LAWRENCE to Proceed in Forma Pauperis (tnc, Pensacola) (Entered: 03/13/2003)
03/11/2003	3	MOTION by petitioner GARY LAWRENCE with memorandum in support for Appointment of Counsel (tnc,Pensacola) (Entered: 03/13/2003)
03/13/2003		Setting 90 day no activity deadline pursuant to N.D.Fla.Loc.R.41.1 to 6/11/03 (tnc,Pensacola) (Entered: 03/13/2003)

DATE	NO.	PROCEEDINGS
03/13/2003		NOTICE to Pro Se of Case Filing and Pleading Format (tnc,Pensacola) (Entered: 03/13/2003)
03/17/2003		FILE location: mailed to Tallahassee Div. Case assigned to Judge Hinkle (Death Penalty Case). (tnc,Pensacola) (Entered: 03/17/2003)
03/18/2003		File Returned to Court: to Judge Robert L. Hinkle Re: [1-1] petition, [2-1] motion to Proceed in Forma Pauperis by GARY LAWRENCE, [3-1] motion for Appointment of Counsel by GARY LAWRENCE (mbs,Tallahassee) (Entered: 03/18/2003)
03/24/2003	4	MOTION by petitioner GARY LAWRENCE for Appointment of Counsel (lcu,Pensacola) (Entered: 03/25/2003)
03/26/2003	5	LETTER by clerk sent to petitioner of reassignment of Judge. Future pleadings to be forwarded to the Tallahassee Div. (tnc,Pensacola) (Entered: 03/26/2003)
03/26/2003		DOCUMENT Location re: [5-1] letter, [4-1] motion for Appointment of Counsel by GARY LAWRENCE Sent to Tallahassee Div. Reason: to update file (tnc,Pensacola) (Entered: 03/26/2003)
05/09/2003	6	MOTION by GARY LAWRENCE for Appointment of Counsel for representation in to-be-filed federal habeas corpus proceedings in a capital case (als,Tallahassee) (Entered: 05/23/2003)

DATE	NO.	PROCEEDINGS
05/27/2003	7	ORDER by Judge Robert L. Hinkle granting [6-1] motion for Appointment of Counsel * added MARY C BONNER, granting [4-1] motion for Appointment of Counsel, granting [3-1] motion for Appointment of Counsel, granting [2-1] motion to Proceed in Forma Pauperis Setting amended petition deadline for 6/26/03 Copies sent as noted on document. (pll,Tallahassee) (Entered: 05/27/2003)
06/05/2003	8	CJA 30 as to GARY LAWRENCE: Appointment of Mary Catherine Bonner, Attorney Copies sent as noted on document. (Original to CJA attorney) (vjr,Tallahassee) (Entered: 06/05/2003)
06/18/2003		Resetting 90 day no activity deadline pursuant to N.D.Fla.Loc.R.41.1 to 9/16/03 (tnc,Pensacola) (Entered: 06/18/2003)
06/26/2003		File Returned to Court: to Judge Robert L. Hinkle Re: [7-2] order (admin) (Entered: 06/26/2003)
07/09/2003	9	ORDER TO SHOW CAUSE by Judge Robert L. Hinkle directed to GARY LAWRENCE to show cause: for failure to comply with an order of the court or why action should not be dismissed. Show Cause Response due by 8/1/03 - return file to court on 8/1/03. Copies sent as noted on document. (als,Tallahassee) (Entered: 07/10/2003)

DATE	NO.	PROCEEDINGS
07/16/2003	10	RESPONSE by GARY LAWRENCE re: [9-1] order and Request for Extension of time in which to file: (als,Tallahassee) (Entered: 07/18/2003)
07/22/2003	11	ORDER by Judge Robert L. Hinkle resetting amended pleadings deadline for 9/2/03 re: [1-1] petition , resetting deadline to return file to court for 9/3/03 Re: [1-1] petition Copies sent as noted on document. (als,Tallahassee) (Entered: 07/23/2003)
09/03/2003		Deadline updated resetting amended pleadings deadline for 9/10/03 re: amended petition , resetting deadline to return file to court for 9/11/03 Re: amended pleading and/or other filing (per chambers) (als, Tallahassee) (Entered: 09/03/2003)
09/08/2003	12	amended complaint/petition by GARY LAWRENCE amending [1-1] petition (als,Tallahassee) (Entered: 09/12/2003)
09/12/2003	13	MEMORANDUM by GARY LAWRENCE in support of [12-1] amended complaint by GARY LAWRENCE. (als,Tallahassee) (Entered: 09/12/2003)
09/16/2003		File Returned to Court: to Judge Robert L. Hinkle Re: [13-1] support memorandum by GARY LAWRENCE, [12-1] amended complaint by GARY LAWRENCE (als,Tallahassee) (Entered: 09/16/2003)
09/16/2003		resetting 90 day no activity deadline pursuant to N.D.Fla.Loc.R.41.1 to 12/15/03 (als,Tallahassee) (Entered: 09/16/2003)

DATE	NO.	PROCEEDINGS
09/22/2003	14	ORDER by Judge Robert L. Hinkle setting answer deadline for 11/20/03 for STATE OF FLORIDA , setting reply to response for plaintiff to respond to reply for 12/15/03 Copies sent as noted on document. (als,Tallahassee) (Entered: 09/22/2003)
10/27/2003	15	SUPPLEMENTAL MEMORANDUM OF LAW AND FACT by GARY LAWRENCE in support of [13-1] support memorandum by GARY LAWRENCE . (als,Tallahassee) (Entered: 10/27/2003)
11/21/2003	16	MOTION for Extension of Time to File Answer re 12 Amended Complaint by STATE OF FLORIDA. (mbs, Tallahassee) (Entered: 12/01/2003)
11/21/2003	17	NOTICE of Appearance by CASSANDRA KAYE DOLGIN on behalf of STATE OF FLORIDA (mbs, Tallahassee) (Entered: 12/01/2003)
12/03/2003	18	ORDER EXTENDING DEADLINE FOR RESPONSE TO AMENDED PETITION; granting 16 Motion for Extension of Time to Answer . Deadline extended through 1/20/04. clerk to provide respondent's attorney of record, on request and without charge, copies of any orders entered but not previously provided to respondent. Signed by Judge ROBERT L HINKLE. (mbs, Tallahassee) (Entered: 12/03/2003)
12/03/2003		Set Deadlines/Hearings: Responses to amended petition due by 1/20/2004 (mbs, Tallahassee) (Entered: 12/03/2003)

DATE	NO.	PROCEEDINGS
01/12/2004	19	RESPONSE TO ORDER TO SHOW CAUSE by STATE OF FLORIDA. (DOLGIN, CASSANDRA) (Entered: 01/12/2004)
01/12/2004	20	NOTICE by STATE OF FLORIDA re 19 Response to Order to Show Cause *Of Filing Habeas Corpus Checklist* (Attachments: # 1 Respondent's Habeas Corpus Checklist) (DOLGIN, CASSANDRA) (Entered: 01/12/2004)
01/12/2004	21	MOTION to Amend/Correct 20 Notice (Other) *By Interlineation* by STATE OF FLORIDA. (Response due by 1/30/2004) (DOLGIN, CASSANDRA) (Entered: 01/12/2004)
01/20/2004	22	NOTICE of receipt by Clerk's office of checklist and copies of state court records by STATE OF FLORIDA re 20 Notice (Other) (mbs, Tallahassee) (Entered: 01/20/2004)
02/02/2004	23	ORDER ON FILING DATE OF ANSWER, granting 21 Motion to Amend/Correct. Signed by Judge ROBERT L HINKLE. (mbs, Tallahassee) (Entered: 02/02/2004)
02/13/2004	24	MOTION to Extend Time *to File Reply to State's Response* by GARY LAWRENCE. (BONNER, MARY) (Entered: 02/13/2004)
02/25/2004	25	ORDER EXTENDING DEADLINE FOR FILING REPLY; granting 24 Motion to Extend Time through 3/31/04. Signed by Judge ROBERT L HINKLE. (mbs, Tallahassee) (Entered: 02/25/2004)

DATE	NO.	PROCEEDINGS
02/25/2004		Set Deadline for Petitioner's Reply to Respondent's response by 3/31/2004. (mbs, Tallahassee) (Entered: 02/25/2004)
03/30/2004	26	REPLY to Response to Motion re 21 MOTION to Amend/Correct 20 Notice (Other) *By Interlineation Motion in Opposition to the State's Order to show cause Response and Motion for Equitable Relief* filed by GARY LAWRENCE. (BONNER, MARY) (Entered: 03/30/2004)
03/31/2004	27	DOCKET ANNOTATION BY COURT: Re 26 Reply to Response to Motion, filed by GARY LAWRENCE. The Electronic Noticing feature for the Northern District of Florida was not properly functioning on March 29, March 30, and prior to 9:00 AM Central time on March 31. This annotation serves as notice that documents were filed and parties not electronically noticed on those days. Documents should not be refiled. Counsel should govern themselves accordingly. (mbs, Tallahassee) (Entered: 03/31/2004)
04/13/2004	28	ORDER STAYING PROCEEDINGS pending final ruling by the U. S. Supreme Court in Caruso v. Abela, 72 U.S.L.W. 3506 (Jan. 20, 2004) (No. 03-1079). Signed by Judge ROBERT L HINKLE on 4/12/04. (mbs, Tallahassee) (Entered: 04/13/2004)

DATE	NO.	PROCEEDINGS
04/15/2004	29	MOTION to *Vacate In Part Order Dated April 12, 2004 And For Order And Judgment Dismissing Petition As Time-Barred* by STATE OF FLORIDA. (Response due by 5/3/2004) (DOLGIN, CASSANDRA) (Entered: 04/15/2004)
04/21/2004	30	ORDER denying 29 Motion to Vacate . Signed by Judge ROBERT L HINKLE. (mbs, Tallahassee) (Entered: 04/22/2004)
05/05/2004	31	NOTICE OF APPEAL as to 28 Order Staying Case, and 30 Order on Motion to Vacate by STATE OF FLORIDA. (Filing fee $255 Receipt Number 400 103826.) Certificate of Readiness due by 5/30/2004 (mbs, Tallahassee) (Entered: 05/06/2004)
05/06/2004	32	USDC LETTER Transmitting 31 NOTICE OF APPEAL as to 28 Order Staying Case, and 30 Order on Motion to Vacate by STATE OF FLORIDA. (Filing fee $255 Receipt Number 400 103826.) Certificate of Readiness due by 5/30/2004 (mbs, Tallahassee) (mbs, Tallahassee) (Entered: 05/06/2004)
05/20/2004	33	USCA PROCEDURAL LETTER re: 31 NOTICE OF APPEAL as to 28 Order Staying Case, and 30 Order on Motion to Vacate by STATE OF FLORIDA. USCA Appeal # 04-12348-P (mbs, Tallahassee) (Entered: 05/21/2004)

DATE	NO.	PROCEEDINGS
05/27/2004	34	ORDER ON STATUS OF STAY. 28 Order Staying Case remains in effect only as long as 31 Notice of Appeal filed by STATE OF FLORIDA remains pending. When that appeal is resolved, the stay will immediately be vacated and judgment will be entered dismissing petition. Signed by Judge ROBERT L HINKLE on 5/27/04. (mbs, Tallahassee) (Entered: 05/28/2004)
06/10/2004	35	USCA PROCEDURAL LETTER re: 31 NOTICE OF APPEAL USCA Appeal # 04-12348-P (amm, Tallahassee) (Entered: 06/15/2004)
09/07/2004	36	ORDER of USCA as to 31 Notice of Appeal filed by STATE OF FLORIDA - Appellee's motion to strike respondent appellant's initial appellant's brief is denied as moot. (amm, Tallahassee) (Entered: 09/13/2004)
09/07/2004	37	USCA ORDER IN LIEU OF MANDATE as to 31 Notice of Appeal filed by STATE OF FLORIDA (amm, Tallahassee) (Entered: 09/13/2004)
09/13/2004		ACTION REQUIRED BY CHAMBERS: Chambers of Judge Hinkle notified that action is needed Re: 34 Order, 37 USCA Order in Lieu of Mandate (amm, Tallahassee) (Entered: 09/13/2004)
09/14/2004	38	MOTION to Extend Time by GARY LAWRENCE. (BONNER, MARY) (Entered: 09/14/2004)

DATE	NO.	PROCEEDINGS
09/16/2004	39	ORDER FOR DISMISSAL. Clerk to enter jugment denying petition as untimely. 38 MOTION to Extend Time filed by GARY LAWRENCE denied as moot. Motions terminated: 38. Signed by Judge ROBERT L HINKLE on 9/16/04. (mbs, Tallahassee) (Entered: 09/20/2004)
09/20/2004	40	JUDGMENT denying petition for writ of habeas corpus as untimely (mbs, Tallahassee) (Entered: 09/20/2004)
10/15/2004	41	NOTICE OF APPEAL as to 39 Order, Terminate Motions, 40 Judgment by GARY LAWRENCE. (Filing fee $255 - Fee not paid) (BONNER, MARY) Modified on 10/19/2004 (amm, Tallahassee). (Entered: 10/15/2004)
10/19/2004	42	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 41 Notice of Appeal (amm, Tallahassee) (Entered: 10/19/2004)
10/25/2004	43	USCA Case Number 04-15435P for 41 NOTICE OF APPEAL as to 39 Order, Terminate Motions, 40 Judgment by GARY LAWRENCE. (Filing fee $255 - Fee not paid) (BONNER, MARY) Modified on 10/19/2004 (amm, Tallahassee). filed by GARY LAWRENCE. (amm, Tallahassee) (Entered: 10/27/2004)
11/01/2004	44	USCA PROCEDURAL LETTER re: 41 NOTICE OF APPEAL. USCA Appeal # 04-15435-P (amm, Tallahassee) (Entered: 11/04/2004)

DATE	NO.	PROCEEDINGS
11/04/2004		ACTION REQUIRED BY CHAMBERS: Chambers of Judge Hinkle notified that action is needed Re: 44 USCA Procedural Letter - COA needed (amm, Tallahassee) (Entered: 11/04/2004)
11/11/2004	45	MOTION for Certificate of Appealability by GARY LAWRENCE. (BONNER, MARY) (Entered: 11/11/2004)
11/11/2004	46	MOTION to Appoint Counsel by GARY LAWRENCE. (BONNER, MARY) (Entered: 11/11/2004)
11/11/2004	47	MOTION for Leave to Appeal in forma pauperis by GARY LAWRENCE. (BONNER, MARY) (Entered: 11/11/2004)
11/12/2004	48	RESPONSE in Opposition re 45 MOTION for Certificate of Appealability filed by STATE OF FLORIDA. (DOLGIN, CASSANDRA) (Entered: 11/12/2004)
11/15/2004	49	ORDER GRANTING CERTIFICATE OF APPEALABILITY - Petitioner's notice of appeal (doc 10) treated as a certificate of appealability and re 45 MOTION for Certificate of Appealability filed by GARY LAWRENCE are granted; 46 MOTION to Appoint Counsel filed by GARY LAWRENCE, 47 MOTION for Leave to Appeal in forma pauperis filed by GARY LAWRENCE are granted. Signed by Judge ROBERT L HINKLE on 11/15/04. (amm, Tallahassee) (Entered: 11/15/2004)

DATE	NO.	PROCEEDINGS
11/24/2004	50	USCA PROCEDURAL LETTER re: 41 NOTICE OF APPEAL as to 39 Order, Terminate Motions, 40 Judgment by GARY LAWRENCE. (Filing fee $255 - Fee not paid) (BONNER, MARY) Modified on 10/19/2004 (amm, Tallahassee). USCA Appeal # 04-15435-P (amm, Tallahassee) (Entered: 12/07/2004)
11/24/2004	51	USCA PROCEDURAL LETTER re: 41 NOTICE OF APPEAL as to 39 Order, Terminate Motions, 40 Judgment by GARY LAWRENCE. (Filing fee $255 - Fee not paid) (BONNER, MARY) Modified on 10/19/2004 (amm, Tallahassee). USCA Appeal # 04-15435-P (amm, Tallahassee) (Entered: 12/07/2004)
12/27/2004	52	ORDER of USCA as to 41 Notice of Appeal filed by GARY LAWRENCE, (amm, Tallahassee) (Entered: 01/05/2005)
02/23/2005	53	Appeal Remark re 41 Notice of Appeal: USCA request for Record on Appeal and Exhibits (amm, Tallahassee) (Entered: 02/24/2005)
02/28/2005	54	Certified and Transmitted Record on Appeal to US Court of Appeals re 41 Notice of Appeal (amm, Tallahassee) (Entered: 02/28/2005)
03/03/2005	55	Certified and Transmitted AMENDED Record on Appeal to US Court of Appeals re 41 Notice of Appeal (3 vol of exhibits forwarded to USCA) (amm, Tallahassee) (Entered: 03/03/2005)

DATE	NO.	PROCEEDINGS
03/07/2005	56	ORDER of USCA as to 41 Notice of Appeal filed by GARY LAWRENCE, (amm, Tallahassee) (Entered: 03/09/2005)
03/07/2005	57	USCA Acknowledgement 54 Appeal Record Sent to USCA USCA Appeal # 04-154350P (amm, Tallahassee) (Entered: 03/09/2005)
03/08/2005	58	USCA Acknowledgement 55 Appeal Record Sent to USCA USCA Appeal # 04-15435-P (amm, Tallahassee) (Entered: 03/14/2005)
08/31/2005	59	USCA ORDER as to 41 Notice of Appeal filed by GARY LAWRENCE (amm, Tallahassee) (Entered: 09/01/2005)
10/03/2005	60	Appeal Record Returned: 31 Notice of Appeal, 41 Notice of Appeal (amm, Tallahassee) (Entered: 10/07/2005)
10/03/2005	61	USCA ORDER IN LIEU OF MANDATE as to 31 Notice of Appeal filed by STATE OF FLORIDA, 41 Notice of Appeal filed by GARY LAWRENCE, (amm, Tallahassee) (Entered: 10/07/2005)

U.S. COURT OF APPEALS
11TH CIRCUIT—ATLANTA

[Docket Date 05/10/04]

Docket #: 04-12348-P

GARY LAWRENCE,
Petitioner-Appellee,

v.

STATE OF FLORIDA,
Respondent-Appellant.

DOCKET ENTRIES

DATE	DATE 2	PROCEEDINGS
05/12/04	/ /	Appearance Form Not Needed for Court Appointment by District Court for Lawrence, Gary Party: Bonner, Mary Catherine
05/18/04	5/18/04	JUR-1 (Letter enclosing jurisdictional question) Issued. c:Bonner, Mary Catherine; c:Dolgin, Cassandra Kaye; c:William McCool
05/18/04	/ /	Jurisdictional Questions Issued
05/26/04	/ /	Appearance Form Submitted. Party: Dolgin, Cassandra Kaye
05/28/04	/ /	Apt Response to Jurisdictional Question: (Atty: Cassandra Kaye Dolgin (#42804-019)) Party: Attorney General of Florida
06/01/04	/ /	Apt Supplemental Response to Jurisdictional Question: (Atty: Cassandra Kaye Dolgin (#42804-019)) Party: Attorney General of Florida

DATE	DATE 2	PROCEEDINGS
06/09/04	05/10/04	Briefing Notice Issued
06/09/04	06/09/04	BR1CIV (Letter confirming brief due date) issued. c:Bonner, Mary Catherine; c:Dolgin, Cassandra Kaye; c:William McCool
06/15/04	/ /	E-Brief Tendered: Appellant by Cassandra Kaye Dolgin (#42804-019) for State of Florida. Party: Attorney General of Florida
06/17/04	06/15/04	Appellant Brief Filed: (Atty: Cassandra Kaye Dolgin (#42804-019)). Party: Attorney General of Florida
06/17/04	06/15/04	Record Excerpts: (Atty: Cassandra Kaye Dolgin (#42804-019)). Party: Attorney General of Florida
07/16/04	07/15/04	Motion to Strike Respondent Appellant's Initial Appellant's Brief: (Atty: Mary Catherine Bonner). Party: Lawrence, Gary
07/22/04	/ /	Response In Opposition to Motion to Strike Respondent Appelaint's Initial Appellant's Brief: (Atty: Cassandra Kaye Dolgin (#42804-019)). Party: Attorney General of Florida
09/02/04	/ /	Appellee's Motion to Strike Respondent Appellant's Initial Appellant's Brief Is DENIED AS MOOT.JFD(j)
09/02/04	/ /	Case Closed. Dismissed-Order
09/02/04	09/02/04	DIS-4 (Letter to district court enclosing court order) Issued. To:William McCool; c:Bonner, Mary Catherine; c:Dolgin, Cassandra Kaye

DATE	DATE 2	PROCEEDINGS
09/02/04	09/02/04	MOT2 (Notice of court action) Issued. c:Bonner, Mary Catherine; c:Dolgin, Cassandra Kaye; c:William McCool
09/02/04	/ /	Appeal is DISMISSED for lack of jurisdiction. JFD/SAB/EEC

U.S. COURT OF APPEALS
11TH CIRCUIT—ATLANTA

[Docket Date 05/10/04]

Docket #: 04-15435-P

GARY LAWRENCE,
Petitioner-Appellant,

v.

STATE OF FLORIDA,
Respondent-Appellee.

DOCKET ENTRIES

DATE	DATE 2	PROCEEDINGS
10/22/04	/ /	Appearance Form Not Needed for Court Appointment by District Court for Lawrence, Gary. Party: Bonner, Mary Catherine
10/25/04	/ /	Probable Jurisdiction Noted
10/27/04	10/27/04	HAB-1 (Docketing Notice) issued. To:Bonner, Mary Catherine; c:Dolgin, Cassandra Kaye; c:William McCool
11/22/04	/ /	CJA-20 Voucher issued (GARY LAWRENCE)
11/22/04	11/15/04	Briefing Notice issued
11/22/04	11/22/04	BR1CIV (Letter confirming brief due date) issued. c:Bonner, Mary Catherine; c:Dolgin, Cassandra Kaye; c:William McCool
11/22/04	11/22/04	CJA1 (CJA appointment of counsel letter) issued. To:Bonner, Mary Catherine; c:William McCool

DATE	DATE 2	PROCEEDINGS
11/22/04	11/15/04	DC Order: IFP, COA & Appointment of Counsel Granted: (Atty: Mary Catherine Bonner). Party: Lawrence, Gary
11/22/04	/ /	CJA-30 Voucher Issued - Mary Catherine Bonner
12/09/04	/ /	Appearance Form Submitted. Party: Dolgin, Cassandra Kaye
12/16/04	/ /	Motion for Extension to File Appellant Brief: (Atty: Mary Catherine Bonner). Party: Lawrence, Gary
12/17/04	/ /	Appellant's motion for extension of time to file the initial brief and records excerpts of appellant to and including January 26, 2005 is GRANTED.JFD(j)
12/17/04	12/16/04	MOT2 (Notice of court action) issued. c:Bonner, Mary Catherine; c:Dolgin, Cassandra Kaye; c:William McCool
01/27/05	/ /	E-Brief Tendered: Appellant by Mary Catherine Bonner for Gary Lawrence (039763). Party: Lawrence, Gary
01/31/05	01/26/05	Appellant Brief Filed: (Atty: Mary Catherine Bonner). Party: Lawrence, Gary
01/31/05	01/26/05	Record Excerpts: (Atty: Mary Catherine Bonner). Party: Lawrence, Gary
02/22/05	/ /	E-Brief Tendered: Appellee by Cassandra Kaye Dolgin for State of Florida. Party: State of Florida
02/23/05	02/22/05	Appellee Brief Filed: (Atty: Cassandra Kaye Dolgin). Party: State of Florida

DATE	DATE 2	PROCEEDINGS
02/28/05	/ /	Motion Requesting Leave to File Appellee's Record Excerpts: (Atty: Cassandra Kaye Dolgin). Party: State of Florida,
03/01/05	/ /	Record on Appeal
03/04/05	/ /	Appellee's motion requesting leave to file "Respondent's Record Excerpts" is GRANTED. JFD(j)
03/04/05	3/04/05	MOT2 (Notice of court action) issued. c:Bonner, Mary Catherine; c:Dolgin, Cassandra Kaye; c:William McCool
03/04/05	/ /	Exhibits - 3 Folders In One (1) Box
03/14/05	03/10/05	Reply Brief Flied: (Atty: Mary Catherine Bonner). Party: Lawrence, Gary
03/18/05	/ /	E-Brief Tendered: Reply by Mary Catherine Bonner for Gary Lawrence (039763). Party: Lawrence, Gary
06/30/05	/ /	Mary Catherine Bonner argued for Appellant; Cassandra Kaye Dolgin argued for Appellee
06/30/05	/ /	Oral Argument Scheduled: Special Panel: 06/30/05
07/11/05	/ /	Supplemental Authority for Appellee: (Atty: Cassandra Kaye Dolgin). Party: State of Florida
08/26/05	/ /	Judgment Entered
08/26/05	08/26/05	OPIN1 (Notice of Issuance of opinion) issued. c:Bonner, Mary Catherine; c:Dolgin, Cassandra Kaye; C:William McCool
08/26/05	/ /	Opinion Issued

DATE	DATE 2	PROCEEDINGS
09/16/05	09/15/05	Motion to Stay Mandate: (Atty: Mary Catherine Bonner). Party: Lawrence, Gary
09/19/05	/ /	Response to Motion to Stay Issuance of Mandate Pending Certiorari Review: (Atty: Cassandra Kaye Dolgin). Party: State of Florida
09/30/05	/ /	The motion of appellant, Gary Lawrence, for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.JFD(j)
09/30/05	09/29/05	MDT1 (Letter issuing mandate) issued. To:William McCool; c:Bonner, Mary Catherine; c:Dolgin, Cassandra Kaye
09/30/05	/ /	Record and Exhibits Returned to District Court -1 Vol. ROA & 3 Fldrs. Exhibits
09/30/05	/ /	Mandate Issued
09/30/05	/ /	CASE CLOSED
12/14/05	01/23/06	Ext. for Filing Certiorari Granted: (Atty: Mary Catherine Bonner). Party: Lawrence, Gary
01/31/06	01/23/06	Notice of Filing Certiorari-Case No. 05-8820: (Atty: Mary Catherine Bonner). Party: Lawrence, Gary
04/05/06	03/27/06	Certiorari Granted: (05-8820) (Atty: Mary Catherine Bonner). Party: Lawrence, Gary

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

PETITION UNDER 28 U.S.C. § 2254 BY A PERSON
IN CUSTODY PURSUANT TO A STATE COURT JUDGMENT

UNITED STATES DISTRICT COURT	Division: 3:03cv97/LAC/MCR	
Name of Petitioner: GARY LAWRENCE	Prisoner No.	Case No. (to be assigned by Clerk):

Place of Confinement (include address): UNION CORRECTIONAL INSTITUTE
P.O. BOX 221, RAIFORD, FLORIDA 32083

NAME OF PETITIONER (include aliases): GARY LAWRENCE
v.
NAME OF RESPONDENT (authorized person having custody of petitioner): STATE OF FLORIDA

ATTORNEY GENERAL OF THE STATE OF: (State in which challenged judgment was entered) FLORIDA

PETITION

1. Name and location (circuit and county) of court which entered the judgment of conviction/sentence under attack: CIRCUIT COURT, 1ST JUDICIAL CIRCUIT SANTA ROSA COUNTY, MILTON, FLORIDA

2. Date of judgment (conviction/sentence): MAY 5, 1995

3. Length of sentence: DEATH

4. Nature of offense involved (all counts): 1.) MURDER -1°; 2.) CONSPIRACY TO COMMIT MURDER; 3.) ROBBERY; 4.) GRAND THEFT

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21

5. What was your plea? (Check one)
(a) Not Guilty [X]
(b) Guilty [ ]
(c) Nolo contendere [ ]

If you entered a guilty plea to one count or indictment, and not a guilty plea to another count or indictment, give details: N/A

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
(a) Jury [X]
(b) Judge only [ ]

7. Did you testify at the trial?
Yes [ ] No [X]

8. Did you appeal from the judgment of conviction?
Yes [X] No [ ]

9. If you did appeal, answer the following:

(a) Name of Court: FLORIDA SUPREME COURT

(b) Result: CONVICTION AFFIRMED - DEATH PENALTY

(c) Date of opinion and mandate (include So.2d citation, if known): AUGUST 29, 1997 - 698 So.2d 1219 (1997)

(d) Did you file a petition for rehearing?
Yes [ ] No [X]
If yes, give the result and date of the result: N/A

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(e) Did you file petition for writ of certiorari?
Yes ☒ No ☐
If yes, give the result and date of the result: CERTIORARI DENIED
522 US 1080, 118 S.Ct. 863, 139 L.Ed 2d 761 _ 1/20/1998

10. Other than the direct appeal, have you previously filed any petitions, applications, or motions with respect to this judgment in state court?
Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court: CIRCUIT COURT, 1st JUDICIAL CIRCUIT
SANTA ROSA COUNTY, MILTON, FLORIDA

(2) Date filed: APRIL 22, 1999

(3) Nature of proceeding (Fla.R.Crim.P. 3.850, habeas corpus, etc.):
MOTION POST CONVICTION 3.850 Fla. R. Crim. Procedure
PETITION HABEAS CORPUS (Ineffective Assistance of Appellate Counsel)

(4) Grounds raised: SEE ATTACHED EXHIBIT A

EXHIBIT A

GROUND ONE
DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL

SUPPORTING FACTS (11 (a)(4))

1. Counsel admitted guilt in his opening and closing argument. Counsel conceded guilt throughout the trial as to lesser-included offenses without consent or advice from Defendant. Defendant, a person with limited intellectual grasp, did not understand and was not advised that counsel would concede to guilt to second degree murder or manslaughter in his opening and closing argument. Counsel conceded guilt to first-degree murder in the penalty phase. That said argument took from the jury the effective chance to consider anything but first-degree murder.

2. Defendant's counsel did not sufficiently prepare for the guilt or penalty phase of the trial and presented inadequate evidence on Defendant's mental deficiency and long standing use of intoxicants and drugs. The defense of intoxication was ineffectively presented.

Defendant's counsel further failed to establish his excessive use of intoxicants at the time of the homicide and failed in getting testimony or records of nurse, Carl Ann Thomas presented to the jury as to his use of intoxicants. This evidence was critical to the intoxication defense and counsel should have correctly pursued its admission or proved up the amount of intoxicants through other witnesses or defendant's own testimony.

3. Defense counsel failed to adequately prepare for trial for failure to advise defendant of his right to testify at the trial (guilt phase or penalty phase) so that the jury was unaware of the extent of his alcohol and drug abuse both long standing and at the time of the offense.

Failure to raise or explore Fetal Alcohol Syndrome manifestations of defendant. Defendant was raised in an alcoholic family, particularly his mother during pregnancy. Defendant shows signs of Fetal Alcohol Syndrome which should have been explored and documented. Said Fetal Alcohol Syndrome causes irreparable brain damage and side effects which are consistent with defendant's conduct while intoxicated.

4. Defendant's counsel was inadequate for failure to pursue or utilize adequate expert testimony in the guilt or penalty phase of his trial as to defendant's impairment from intoxicants or drugs.

5. Defendant's counsel failed to object to or preclude felony murder evidence of a robbery wherein the State did not have sufficient evidence to argue felony murder in its opening statement. This caused failure to properly apprize the jury that the robbery aspect of felony murder was not proven. Defense counsel failed to secure appropriate or adequate instructions to the jury that said felony-murder (robbery) was not established.

6. Defendant's counsel failed to pursue or present adequate evidence of Defendant's extreme or emotional disturbance. Except for psychologist, James Larson, Jr. and psychiatrist, Dr. Galloway, defendant's attorney did not attempt to present any witnesses or other evidence of defendant's mental or emotional disturbance.

That said experts failed to establish Defendant's severe inadequacy both with respect to waiver if [sic] his constitutional rights (Motion to Suppress) and level of alcohol impairment as to guilt and penalty phases.

7. Defendant's counsel failed to object or move for a mistrial as to the State's argument in the penalty phase which sought to impugn or minimize and shift the burden of proof as to his defense of intoxication and mental impairment, to

wit: Assistant State Attorney, Mr. Molchan state [sic] in penalty argument:

> "An aggravating circumstance, ladies and gentlemen, that is proven beyond a reasonable doubt. Again we can talk about the psychological testimony that went on and on with respect to this case but the bottom line is regardless of the psychological evidence and that type of stuff Gary Lawrence, beyond any reasonable doubt was committing a crime while under a sentence of imprisonment. Colleen Poole basically said all that needs to be done if he violates or does anything is an administrative parole. He was under a sentence of incarceration in the state penitentiary."

8. That defendant's counsel was inadequately prepared for a death penalty phase, as he was not assisted by death penalty counsel. Failure of defendant's counsel to have or appoint separate counsel for a death penalty case violates due process, Section 9, Florida Court, and V, XIV Amendments to the U.S. Constitution.

9. Defendant's counsel was ineffective and incorrect in his death penalty phase argument wherein he told the jury:

> "We have never at any time in this case disputed Gary Lawrence's guilt, and we have never at any time in this case disputed the fact or we have never suggested to you that Chris Wetheree should be held to the same degree of accountability as Gary Lawrence. We have never told you that."

10. Defendant's counsel was inadequate in failing to move for a mistrial as to hearsay evidence offered to support a robbery theory of felony murder. (Transcript P234-236). Argument or evidence of an alleged robbery of the victim necessarily infected the trial jury and failure to request a mistrial or curative instruction rendered defendant's counsel performance deficient. Likewise, the inclusion of a robbery

argument by the State without a subsequent limiting instruction to the jury denied defendant due process under Article I, Section 9, of the Florida Constitution, and both the Fifth and Fourteenth Amendments to the United States Constitution.

11. Counsel's failure to object, move for mistrial or failure to raise these issues on appeal to the Florida Supreme Court constitute ineffective assistance of trial and appeal counsel. To the extent these issues involve ineffective appellate counsel, Defendant prays this court treat this Motion as a petition for Writ of Habeas Corpus.

12. Defendant's appellate counsel failed to raise any issues as to the guilt phase on appeal, although trail counsel properly preserved the same or such errors were fundamental. To the extent appellate counsel was ineffective, defendant prays this Court treat this issue as a Petition for Writ of Habeas Corpus. Thus, the Florida Supreme Court was limited t [sic] review of the death penalty issues only. Issues not raised on appeal, *inter alia*, were Motion to Suppress Statements and Motion to declare death penalty unconstitutional.

13. State's counsel argued repeatedly during closing argument in the guilt phase that evidence was "uncontroverted". Defense counsel failed to object or move for mistrial as defendant did not testify and the argument was a prejudicial comment on his failure to testify. Furthermore, said comment was a burden shifting argument that inferred defendant was required to controvert an issue or evidence. It also amounted to an expression if [sic] prosecutor's personal opinion as opposed to legal argument. Said argument violated defendant's due process rights under Section 9, Florida Constitution and V and XIV Amendments U.S. Constitution.

14. Defendant's trial counsel waived search and seizure issues at trial after initially preserving them by pre-trial Motion to Suppress. Defense counsel thereafter did not reassert the issues and accordingly waived their inclusion for appellate review.

GROUND TWO
DENIAL OF RIGHT TO IMPARTIAL JURY DUE PROCESS VIOLATION

Defendant was denied access to an impartial jury required by the Fifth and Fourteen Amendment to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution. Defendant's venire was called from a list of voters from Santa Rosa County as opposed to the current process of selecting jurors from drivers license list selection of jurors from voter lists amounts to a constitutional violative blue ribbon jury process in violation of both the United States and Florida Constitutions.

GROUND THREE

Florida's capital sentencing statue is unconstitutional on its face and as applied in this case because it fails to prevent the arbitrary and capricious imposition of the death penalty, and it violates the constitutional guarantees of due process and prohibiting cruel and unusual punishment.

Florida's capital sentencing scheme denies Mr. Lawrence's right to due process of law, and constitutes cruel and unusual punishment on its face and as applied in this case. Florida's death penalty statute is constitutional only to the extent that it prevents arbitrary imposition of the death penalty and narrow application of the penalty to the worst offenders. The Florida death penalty statute, however, fails to meet these constitutional guarantees, and therefore violates the Fifth and Eighth Amendment to the United States Constitution.

(5) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☒ No ☐

(6) Result: 3.850 DENIED

(7) Date of result: October 11, 2000

(b) Did you appeal the result?
Yes ☒ No ☐

If yes, give the result and date of the opinion and mandate (include So.2d citation, if known): ___So. 2d ___, 2002 W.L. 31317967, 27 Fl.W. S877, SC00-2290, SC01-674

(c) If you did not appeal the result, explain briefly why you did not:

N/A

12. Did you file any other petitions or motions in state court aside from those described above?
Yes ☐ No ☒

If yes, set forth on a separate sheet of paper the same information (as requested in 11(a)-(c)) as to the other petitions or motions.

13. Have you previously filed a § 2254 petition, or other pleading regarding the validity of your state court confinement, in any federal court?
Yes ☒ No ☐

If yes, provide the name of the court, case number, and result (including the result of any appeal):

U.S. SUPREME COURT CERTIORARI, INFO PENDING

Petitioner has a pending Petition for Writ of Certiorari in the U.S. Supreme Court. It has been calculated that his time for filing federal habeas corpus would expire one day after denial of certiorari. Thus, he would have insufficient time to file for federal habeas corpus. Petitioner requests ruling herein be deferred until such time as U.S. Certiorar is determined.

14. In the spaces below, set forth all grounds on which you claim that you are being held in violation of the Constitution, laws or treaties of the United States. You must provide a summary of specific facts in support of each ground raised. Even if you file a separate memorandum of law, the facts must be set forth on this petition form. If necessary, you may attach pages setting forth additional grounds and supporting facts.

Caution: If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

A. Ground one: DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL

Supporting FACTS (state *briefly* without citing cases or law):

SEE ATTACHED - (GROUND ONE - SUPPORTING FACT (14-A))

Did you raise this claim in state court by direct appeal, 3.850 motion, or otherwise?

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GROUND ONE

DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL SUPPORTING FACTS (14–A)

1. Counsel admitted guilt in his opening and closing argument. Counsel conceded guilt throughout the trial as to lesser-included offenses without consent or advice from Defendant. Defendant, a person with limited intellectual grasp, did not understand and was not advised that counsel would concede to guilt to second degree murder or manslaughter in his opening and closing argument. Counsel conceded guilt to first-degree murder in the penalty phase. That said argument took from the jury the effective chance to consider anything but first-degree murder.

2. Defendant's counsel did not sufficiently prepare for the guilt or penalty phase of the trial and presented inadequate evidence on Defendant's mental deficiency and long standing use of intoxicants and drugs. The defense of intoxication was ineffectively presented.

Defendant's counsel further failed to establish his excessive use of intoxicants at the time of the homicide and failed in getting testimony or records of nurse, Carl Ann Thomas presented to the jury as to his use of intoxicants. This evidence was critical to the intoxication defense and counsel should have correctly pursued its admission or proved up the amount of intoxicants through other witnesses or defendant's own testimony.

3. Defense counsel failed to adequately prepare for trial for failure to advise defendant of his right to testify at the trial (guilt phase or penalty phase) so that the jury was unaware of the extent of his alcohol and drug abuse both long standing and at the time of the offense.

Failure to raise or explore Fetal Alcohol Syndrome manifestations of defendant. Defendant was raised in an alcoholic family, particularly his mother during pregnancy. Defendant

shows signs of Fetal Alcohol Syndrome which should have been explored and documented. Said Fetal Alcohol Syndrome causes irreparable brain damage and side effects which are consistent with defendant's conduct while intoxicated.

4. Defendant's counsel was inadequate for failure to pursue or utilize adequate expert testimony in the guilt or penalty phase of his trial as to defendant's impairment from intoxicants or drugs.

5. Defendant's counsel failed to object to or preclude felony murder evidence of a robbery wherein the State did not have sufficient evidence to argue felony murder in its opening statement. This caused failure to properly apprize the jury that the robbery aspect of felony murder was not proven. Defense counsel failed to secure appropriate or adequate instructions to the jury that said felony-murder (robbery) was not established.

6. Defendant's counsel failed to pursue or present adequate evidence of Defendant's extreme or emotional disturbance. Except for psychologist, James Larson, Jr. and psychiatrist, Dr. Galloway, defendant's attorney did not attempt to present any witnesses or other evidence of defendant's mental or emotional disturbance.

That said experts failed to establish Defendant's severe inadequacy both with respect to waiver if [sic] his constitutional rights (Motion to Suppress) and level of alcohol impairment as to guilt and penalty phases.

7. Defendant's counsel failed to object or move for a mistrial as to the State's argument in the penalty phase which sought to impugn or minimize and shift the burden of proof as to his defense of intoxication and mental impairment, to wit: Assistant State Attorney, Mr. Molchan state [sic] in penalty argument:

> "An aggravating circumstance, ladies and gentlemen, that is proven beyond a reasonable doubt. Again we can

> talk about the psychological testimony that went on and on with respect to this case but the bottom line is regardless of the psychological evidence and that type of stuff Gary Lawrence, beyond any reasonable doubt was committing a crime while under a sentence of imprisonment. Colleen Poole basically said all that needs to be done if he violates or does anything is an administrative parole. He was under a sentence of incarceration in the state penitentiary."

8. That defendant's counsel was inadequately prepared for a death penalty phase, as he was not assisted by death penalty counsel. Failure of defendant's counsel to have or appoint separate counsel for a death penalty case violates due process, Section 9, Florida court, and V, XIV Amendments to the U.S. Constitution.

9. Defendant's counsel was ineffective and incorrect in his death penalty phase argument wherein he told the jury:

> "We have never at any time in this case disputed Gary Lawrence's guilt, and we have never at any time in this case disputed the fact or we have never suggested to you that Chris Wetheree should be held to the same degree of accountability as Gary Lawrence. We have never told you that."

10. Defendant's counsel was inadequate in failing to move for a mistrial as to hearsay evidence offered to support a robbery theory of felony murder. (Transcript P234-236). Argument or evidence of an alleged robbery of the victim necessarily infected the trial jury and failure to request a mistrial or curative instruction rendered defendant's counsel performance deficient. Likewise, the inclusion of a robbery argument by the State without a subsequent limiting instruction to the jury denied defendant due process under Article I, Section 9, of the Florida Constitution, and both the Fifth and Fourteenth Amendments to the United States Constitution.

11. Counsel's failure to object, move for mistrial or failure to raise these issues on appeal to the Florida Supreme Court constitute ineffective assistance of trial and appeal counsel. To the extent these issues involve ineffective appellate counsel, Defendant prays this court treat this Motion as a petition for Writ of Habeas Corpus.

12. Defendant's appellate counsel failed to raise any issues as to the guilt phase on appeal, although trail counsel properly preserved the same or such errors were fundamental. To the extent appellate counsel was ineffective, defendant prays this Court treat this issue as a Petition for Writ of Habeas Corpus. Thus, the Florida Supreme Court was limited t [sic] review of the death penalty issues only. Issues not raised on appeal, *inter alia*, were Motion to Suppress Statements and Motion to declare death penalty unconstitutional.

13. State's counsel argued repeatedly during closing argument in the guilt phase that evidence was "uncontroverted". Defense counsel failed to object or move for mistrial as defendant did not testify and the argument was a prejudicial comment on his failure to testify. Furthermore, said comment was a burden shifting argument that inferred defendant was required to controvert an issue or evidence. It also amounted to an expression if [sic] prosecutor's personal opinion as opposed to legal argument. Said argument violated defendant's due process rights under Section 9, Florida Constitution and V and XIV Amendments U.S. Constitution.

14. Defendant's trial counsel waived search and seizure issues at trial after initially preserving them by pre-trial Motion to Suppress. Defense counsel thereafter did not reassert the issues and accordingly waived their inclusion for appellate review.

Yes ☒ No ☐
If yes, explain how it was raised; if no explain why it was not raised:
RAISED IN STATE 3.850

B. Ground two: DENIAL OF RIGHT TO IMPARTIAL JURY DUE PROCESS VIOLATION

Supporting FACTS (state *briefly* without citing cases or law):

Defendant was denied access to an impartial jury required by the Fifth and Fourteenth Amendment to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution. Defendant's venire was called from a list of voters from Santa Rosa County as opposed to the current process of selecting jurors from drivers license list selection of jurors from voter lists amounts to a constitutional violative blue ribbon process in violation of both the United States and Florida Constitutions.

Did you raise this claim in state court by direct appeal, 3.850 motion, or otherwise?
Yes ☒ No ☐
If yes, explain how it was raised; if no explain why it was not raised:
Raised in State Court 3.850

C. Ground three: SEE ATTACHED - GROUND 3

Supporting FACTS (state briefly without citing cases or law):

Did you raise this claim in state court by direct appeal, 3.850 motion, or otherwise?

Yes ☒ No ☐

If yes, explain how it was raised; if no explain why it was not raised:

3.850 Motion for Post Conviction

D. Ground four:

GROUND THREE

Florida's capital sentencing statue is unconstitutional on its face and as applied in this case because it fails to prevent the arbitrary and capricious imposition of the death penalty, and it violates the constitutional guarantees of due process and prohibiting cruel and unusual punishment.

Florida's capital sentencing scheme denies Mr. Lawrence's right to due process of law, and constitutes cruel and unusual punishment on its face and as applied in this case. Florida's death penalty statute is constitutional only to the extent that it prevents arbitrary imposition of the death penalty and narrow application of the penalty to the worst offenders. The Florida death penalty statute, however, fails to meet these constitutional guarantees, and therefore violates the Fifth and Eighth Amendment to the United States Constitution.

Supporting FACTS (state *briefly* without citing cases or law):

Did you raise this claim in state court by direct appeal, 3.850 motion, or otherwise?

Yes ☐ No ☐

If yes, explain how it was raised; if no explain why it was not raised:

E. Set forth additional grounds, if any, on separate sheets of paper.

15. What relief do you seek from this Court if your § 2254 petition is granted? NEW TRIAL (RESENTENCING)

Wherefore, petitioner prays that the Court grant all relief to which he or she may be entitled in this proceeding.

I declare (or certify, verify, or state) under penalty or perjury that the foregoing is true and correct. Executed on:

3-5-2003
(Date)

Gary Laurence
Signature of Petitioner

IF MAILED BY PRISONER:

I declare or state under penalty of perjury that this petition was (check one):
☐ delivered to prison officials for mailing, or ☐ deposited in the prison's internal mail system on:

_____ (date).

Gary Laurence
Signature of Petitioner

Revised 07/02

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

CASE NO: ____

GARY LAWRENCE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the *pro se* Petition for Habeas Corpus, Motion to Proceed in *Forma Pauperis* and financial affidavit have been served by U.S. Mail upon JAMES V. CROSBY, JR., Secretary, Department of Corrections, 2601 Blair Stone Road, Tallahassee, FL 32399-2500, the Office of the Attorney General, BARBARA YATES, Assistant Attorney General, The Florida Capitol Building, Plaza Level One, Tallahassee, Florida 32399-1050 and the Office of the State Attorney, JOHN MOLCHAN, ASA, Santa Rosa County, P.O. Box 645, Milton, Florida 32572 this the 5th day of March, 2003.

/s/ Gary Lawrence
GARY LAWRENCE
PRO SE PETITIONER-DOC#039763
UNION CORRECTIONAL INSTITUTION
P.O. BOX 221
RAIFORD, FL 32083

AO 241 (Rev 5/85)

PETITION UNDER 28 USC § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District NORTHERN DIST. OF FLORIDA	
Name GARY LAWRENCE	Prisoner No. 039763	Case No. 3:03CV97-RH

Place of Confinement
UCI, 7819 NW 228 ST, RAIFORD, FL 32026-4410

Name of Petitioner (include name under which convicted)
GARY LAWRENCE

V.

Name of Respondent (authorized person having custody of petitioner)
JAMES V. CROSBY, JR
SECRETARY DEPT. OF CORRECTIONS

The Attorney General of the State of:
FLORIDA

PETITION

1. Name and location of court which entered the judgment of conviction under attack CIRCUIT COURT
1ST JUDICIAL CIRCUIT IN AND FOR SANTA ROSA COUNTY, FLORIDA
2. Date of judgment of conviction 5/5/95
3. Length of DEATH
4. Nature of offense involved (all counts) 1ST DEGREE PREMEDITATED MURDER; CONSPIRACY TO COMMIT 1ST DEGREE MURDER; ROBBERY WITH A DEADLY WEAPON; THEFT OF A MOTOR VEHICLE - JUDGMENT OF ACQUITTAL ENTERED AND PASSED AS TO FIRST DEGREE - SENTENCE ENTERED ON LIFE/LIFE - DOA ON FELONY MURDER & ROBBERY
5. What was your plea? (Check one)
   (a) Not guilty ☒
   (b) Guilty ☐
   (c) Nolo contendere ☐
   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
   (a) Jury ☒
   (b) Judge only ☐
7. Did you testify at the trial?
   Yes ☐ No ☒
8. Did you appeal from the judgment of conviction?
   Yes ☒ No ☐

AO 241 (Rev. 5/85)

9. If you did appeal, answer the following:

(a) Name of court SUPREME COURT OF FLORIDA

(b) Result CONVICTION AND SENTENCE AFFIRMED

(c) Date of result and citation, if known 684 SO 2D 1319 (FLA 1996) - 6/26/97

(d) Grounds raised SEE SUPPLEMENT -- 9(d)

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court N/A

(2) Result

(3) Date of result and citation, if known

(4) Grounds raised

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court UNITED STATES SUPREME COURT

(2) Result CERTIORARI DENIED

(3) Date of result and citation, if known 1/26/98

(4) Grounds raised SEE SUPPLEMENT 9(f)(4)

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes ☑ No ☐

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court CIR CT 1ST JUDICIAL CIRCUIT FOR SANTA ROSA COUNTY, FLA.

(2) Nature of proceeding FLA R. CRIM P. 3.850 - 3.851 - MOTION TO VACATE; SET ASIDE OR CORRECT

(3) Grounds raised SEE SUPPLEMENT III(a)(1)

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(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☑ No ☐ – 2 SUBARTS of IAC Claim

(5) Result RELIEF DENIED

(6) Date of result 10/11/00

(b) As to any second petition, application or motion give the same information:

(1) Name of court N/A

(2) Name of proceeding

(3) Grounds raised

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result

(6) Date of result

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☑ No ☐

(2) Second petition, etc. Yes ☐ No ☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

N/A

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

AO 241 (Rev. 5/85)

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: See Supplement Question 12

Supporting FACTS (state *briefly* without citing cases or law):

See Supplement Ques. 12

B. Ground two: See Supplement Ques. 12

Supporting FACTS (state *briefly* without citing cases or law):

See Supplement Ques. 12

AO 241 (Rev. 5/85)

C. Ground three: See Supplement Ques 12

Supporting FACTS (state *briefly* without citing cases or law): See Supplement Ques 12

D. Ground four: See Supplement Ques 12

Supporting FACTS (state *briefly* without citing cases or law): See Supplement Ques 12

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☑

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
(a) At preliminary hearing John Miller, PO Box 605 Milton FL 32572

(b) At arraignment and plea John Miller

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(c) At trial JOHN MILLER

(d) At sentencing JOHN MILLER

(e) On appeal STEVEN SCHLEIER, 16 NORTH ADAMS ST, QUINCY FL 32353

(f) In any post-conviction proceeding JOSEPH MCDERMOTT, 2116 GULF BLVD, STE A, ST. PETERSBURG, FL 33706

(g) On appeal from any adverse ruling in a post-conviction proceeding JOSEPH MCDERMOTT

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ☑ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☑
(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) Give date and length of the above sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☐

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

Date

Signature of Petitioner

SUPPLEMENT TO PETITION FOR RELIEF UNDER TITLE 28 USC § 2254 QUESTION 9(d)

I. DEATH IS A DISPROPORTIONATE SENTENCE FOR GARY LAWRENCE

II. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT THE MURDER WAS COLD, CALCULATED AND PREMEDITATED

III. THE TRIAL COURT ERRED IN ITS INSTRUCTIONS TO THE JURY AS TO THE AGGRAVATING FACTOR OF "COLD, CALCULATED AND PREMEDITATED"

IV. THE EVIDENCE PRESENTED BY THE STATE DID NOT SUPPORT A FINDING THAT THE MURDER WAS "HEINOUS, ATROCIOUS OR CRUEL"

V. THE TRIAL COURT'S INSTRUCTION ON "HEINOUS, ATROCIOUS OR CRUEL" WAS CONSTITUTIONALLY INADEQUATE

VI. THE TRIAL COURT FAILED TO MAKE CLEAR TO THE JURY THAT IT COULD EXERCISE ITS REASONED JUDGMENT AND RECOMMEND LIFE IMPRISONMENT EVEN IF THE MITIGATING CIRCUMSTANCES DID NOT OUTWEIGH THE AGGRAVATING CIRCUMSTANCES IN MR. LAWRENCE'S CASE

VII. THE TRIAL COURT IMPROPERLY REJECTED PROFFERED MITIGATION

SUPPLEMENT TO PETITION FOR RELIEF UNDER TITLE 28 USC § 2254 QUESTION 9(f)(4)

1. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S 3.850-MOTION FOR POST CONVICTION RELIEF—INEFFECTIVE COUNSEL CLAIM BASED UPON TRIAL COUNSEL'S CONCESSION OF GUILT IN BOTH GUILT AND PENALTY PHASES WITHOUT ON THE RECORD CONSENT BY DEFENDANT. (CONTRARY TO DUE PROCESS AND ASSISTANCE OF COUNSEL PROVISIONS OF V, VI AND XIV AMENDMENTS OF THE UNITED STATES CONSTITUTION AND SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.)

2. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S 3.850-MOTION FOR POST CONVICTION RELIEF—INEFFECTIVE COUNSEL CLAIM BASED UPON TRIAL COUNSEL'S FAILURE TO ADEQUATELY ADVISE DEFENDANT OF HIS RIGHT TO TESTIFY AND FAILURE TO OBTAIN A RECORD WAIVER OF THIS RIGHT. (VIOLATION OF V, VI AND XIV AMENDMENTS OF THE UNITED STATES CONSTITUTION AND SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.)

3. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S 3.850-MOTION FOR POST CONVICTION RELIEF UPON GROUNDS THE PROSECUTION ENGAGED IN BURDEN SHIFTING ARGUMENT AND INDIRECT COMMENTS ON DEFENDANT'S FAILURE TO TESTIFY IN THE GUILT PHASE. (VIOLATION OF V, VI AND XIV AMENDMENTS OF THE UNITED STATES CONSTITUTION AND SECTION 9 OF THE FLORIDA CONSTITUTION.)

SUPPLEMENT TO PETITION FOR RELIEF UNDER TITLE 28 USC § 2254 QUESTION 11(a)(3)

GROUND 1.: Denial of effective assistance of counsel.

GROUND 2.: Denial of Right to Impartial Jury Due Process Violation.

GROUND 3.: Due Process Violated by Trial Court Regarding Defendant's Prior Prison Record

GROUND 4.: Lack of Sentencing Proportionality Between Equally Culpable Codefendants.

GROUND 5.: Due Process Violation Improper Aggravator Evidence.

GROUND 6: Ineffective Assistance of Counsel.

GROUND 7: Public Records Unavailable

GROUND 8.: Judicial Records Unavailable

GROUND 9.: The Trial Court erroneously instructed Mr. Lawrence's jury on the standard by which they must judge expert testimony.

GROUND 10: Mr. Lawrence is innocent of the death penalty.

GROUND 11.: The Florida Supreme Court failed to conduct a meaningful harmless error analysis when considering the effects of an erroneous jury instruction regarding the heinous, atrocious or cruel and cold, calculating and premeditated aggravating circumstances in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

GROUND 12.: Mr. Lawrence's jury was improperly instructed on the under sentence of imprisonment aggravating factor in violation of *Espinosa v. Florida, Stringer v. Black, Maynard v. Cartwright, Hitchcock v. Dugger* and the the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

GROUND 13: Mr. Lawrence's sentencing jury was misled by comments and instruction which unconstitutionally and inaccurately diluted its sense of responsbility for sentencing in violation of the Eighth and Fourteenth Amendments to the Untied States Constitution.

GROUND 14.: Florida Capital sentencing statute is unconstitutional on its face and as applied in this case because it fails to prevent the arbitrary capricious imposition of the death penalty and it violates the Constitutional guarantees of due process and prohibiting cruel and unusual punishment.

GROUND 15.: Motion to Amend 3.850 Amendment Request.

Supplement to Petition for Relief under Title 28 U.S.C. § 2254 Question 12

GROUND I: DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL

Trial counsel for this intellectually challenged, severely alcoholic and drug dependant defendant "threw in the towel" at both the guilt and the penalty phases of the prosecution thereby denying Mr. Lawrence the type and quality of representation which would have meaningfully challenged the prosecution's case and would have comported with the Sixth Amendment. Mr. Lawrence received ineffective assistance of counsel from which prejudice flowed. This prejudice was of the type and quantum that the results of the guilt and penalty phases of the trial cannot be relied upon.

There are multiple factual bases for this allegation.

A. Defense counsel, without the knowledge or acquiescence of the defendant, who continued to persist in his plea of not guilty, clearly admitted—without authorization—that the defendant was guilty "of something."

B. Defense counsel failed to advise the defendant of his right to testify at the guilt or the penalty phases of his trial and therefore this important right was not knowingly, intelligently or voluntarily waived.

C. Defense counsel failed to present sufficient expert or non-expert testimony as to fetal alcohol syndrome, the extent of Mr. Lawrence's life-long addictions to alcohol and drugs; and the effect of drugs on Mr. Lawrence on the day of the incident.

D. Defense Counsel failed to effectively investigate or present the defense of intoxication ineffectively.

E. Defense counsel failed to present adequate evidence of defendant's emotional state, mental state, intelligence levels, and mental deficiencies each of which was relevant to guilt; to whether there was a knowing waiver of rights; and to penalty phase mitigation.

F. Defense counsel failed to object to assertions by the State in its opening presentation on the charge of robbery for which the State knew that there was no credible, admissible basis and which was argued to underlie the then-theory of felony murder.

G. Defense counsel failed to move for a mistrial when the State made burden shifting comments made by the state in the penalty phase.

H. Defense counsel was inadequately prepared for a death penalty phase and, in spite of the fact that this was his first death case, no co-counsel was requested nor appointed to assist him.

I. Defense counsel was ineffective when he stated that codefendant was not to be held to the same degree of culpability.

J. Appellate defense counsel failed to raise any issues as to the guilt phase of the trial on appeal, including suppression or the unconstitutionality of the death penalty itself although, *inter alia*, these issues were preserved.

K. Defense counsel rendered inadequate assistance of counsel when he failed to object to burden shifting State arguments which were comments on the defendant's failure to testify.

L. Defense counsel rendered inadequate assistance of counsel when he waived, at the trial stage, the issues of suppression.

M. Defense trial and appellate counsel failed to provide effective assistance of counsel when, the comment from a State witness that he had known Gary Lawrence since Gary got out of prison, went unaddressed.

N. Defense counsel rendered ineffective assistance of counsel when counsel entered into a written stipulation, not signed by Gary Lawrence, as to the identity of the body which was located by police.

GROUND 2

Although Gary Lawrence and his wife-co-defendant Brenda Lawrence were of equal culpability, and although the death penalty's Constitutionality is hinged on a meaningful proportionality between sentences, the trial court when it did not make a meaningful comparison of the roles of the two defendants v. the sentences received by the two defendants. The Supreme Court, likewise, did not engage in adequate proportionality review as to the sentence of Gary Lawrence.

GROUND 3

The State's death penalty scheme is unconstitutional in that it deprives the defendant of a unanimous verdict of death from the jury. Rather, the scheme provides for the sentencing jury to hear evidence and to propound a numerical verdict. The court then, with no knowledge of the factual underpinnings of the verdict, takes the verdict into consideration, purportedly giving it great weight. However, it is solely the sentencing judge who makes the sentencing decision of life or death.

The jury was told that it had "advisory" functions only and repeated comments by the State, reinforced by jury instructions, unconstitutionally diluted the responsibility which the "jurors"—although not decision makers—were to labor under.

Ground 4

The Court and all parties to the litigation have a heightened duty to the defendant when it is apparent that he does not understand or even recall those things which are happening or have happened in his prosecution, or he is emotionally impaired.

Ground 5

The trial court failed to permit evidence or to entertain legal argument on the following issues. Taken singly or together they set out significant violations of the Constitutional rights of Mr. Lawrence under the United States Constitution and its Amendments.

A. The processes in place in Santa Rosa County for the assembly of jury venires violated the Fifth and Sixth Amendments to the United States Constitution, as incorporated in the Fourteenth Amendment, were not tailored to and did not yield a cross section of the citizenry and virtually assured that the resultant

venire and petit juries were the result of purposeful discrimination.

B. The failure of the court to grant a mistrial when a State witness stated that he had known Mr. Lawrence since Lawrence **got out of prison** *before the trial penalty phase jury* denied Lawrence due process.

C. The Florida death scheme which permits the introduction of evidence of "under a sentence of imprisonment" is unconstitutional as applied in this case in that it permits this aggravating factor even though the defendant is on "conditional release."

D. Defense counsel was forced to prepare and proceed on his Florida Motion to Vacate without provision of all Public Records or Judicial Records.

E. Mr. Lawrence was denied due process when his jury was given an erroneous expert witness jury instruction.

F. Since the instructions given on the issues of "under the sentence of imprisonment," heinous, atrocious and cruel, and cold, calculated and premeditated, the Florida courts utilized incorrect law in establishing that any aggravator existed, therefore, Mr. Lawrence is innocent of the death penalty. In spite of this the Florida Supreme Court failed in its "harmless error" analysis, and Mr Lawrence submits that these errors did contribute to his verdicts.

G. Florida's capital sentencing statute is unconstitutional on its face and as applied because it fails to prevent arbitrary and capricious imposition of death and violated due process and fails to prohibit cruel and unusual punishment.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

Case No. 3:03CV97-rh
CAPITAL CASE

GARY LAWRENCE,

Petitioner,

v.

JAMES V. CROSBY,

Respondent.

RESPONSE TO ORDER TO SHOW CAUSE WHY A WRIT OF HABEAS CORPUS SHOULD NOT BE GRANTED

Comes now Respondent, by and through counsel, and in response to this Court's order to show cause why a writ of habeas corpus should not be granted, states as follows:

Statement of Custody and Parties

Named petitioner, Gary Lawrence, presently is in the custody of the Florida Department of Corrections at the Union Correctional Institution in Raiford, Florida. Petitioner, convicted of one count each of first-degree murder, conspiracy to commit murder, auto theft, and petty theft, was sentenced to death on the murder charge, received two concurrent terms of five years imprisonment for conspiracy and auto theft, and time served on the petty theft charge. Petitioner thus is in the lawful custody of the State of Florida. Petitioner's custodian, James V. Crosby, Secretary of the Florida Deparment of Corrections, is the properly named party respondent. *See* 28 U.S.C. § 2254, Rule 2(a).

Statement of Exhibits[1]

1. Respondent's Exhibit 1 is a true and correct copy of the Exhibits Index in petitioner's direct appeal to the Florida Supreme Court, cause number 85,725, styled *Gary Lawrence v. State of Florida*, and is herein incorporated by reference;

2. Respondent's Exhibits 2-I, 2-II, 2-III, 2-IV, 2-V, 2-VI, 2-VII, and 2-VIII are true and correct copies of the Transcript Of The Record, Volumes I-VIII, in cause number 85,725, encompassing Tab #s A-S, U-KK[2], and are herein incorporated by reference;

3. Respondent's Exhibit 3 is a true and correct copy of the Brief Of Appellant filed in cause number 85,725, encompassing Tab #LL, and is herein incorporated by reference;

4. Respondent's Exhibit 4 is a true and correct copy of the State's Answer Brief Of Appellee in cause number 85,725, encompassing Tab #MM, and is herein incorporated by reference;

5. Respondent's Exhibit 5 is a true and correct copy of the Reply Brief Of Appellant in cause number 85,725, and is herein incorporated by reference;

6. Respondent's Exhibit 6 is a true and correct copy of the Opinion of the Florida Supreme Court in cause number 85,725, dated August 28, 1997, encompassing Tab #NN, and is herein incorporated by reference;

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[1] A "Notice Of Filing" and the above-listed exhibits which are in paper form only and will be maintained in the Clerk's Office, have been sent to the Clerk's Office for filing.

[2] Filed contemporaneously with this Response is "Respondent's Habeas Corpus Checklist," identifying applicable tab numbers included in the checklist pursuant to Local Rule 5.1(K)(2). The checklist was filed as an attachment to the "Notice Of Filing Habeas Corpus Checklist."

7. Respondent's Exhibit 7 is a true and correct copy of the Order of the United States Supreme Court denying petitioner's Petition For Writ Of Certiorari, dated January 20, 1998 in cause number 97-6787, styled *Gary Lawrence v. Florida*, and is herein incorporated by reference;

8. Respondent's Exhibit 8 is an Order Appointing Counsel in cause number 94-397-CFA, styled *State of Florida v. Gary Lawrence*, and is herein incorporated by reference;

9. Respondent's Exhibits 9-I and 9-II are true and correct copies of the Transcript Of Record, Volumes I and II, in petitioner's appeal from the denial of postconviction relief, cause number SC00-2290, styled *Gary Lawrence v. State of Florida*, encompassing Tab #s OO-PP, and RR, and are herein incorporated by reference;

10. Respondent's Exhibit 10 is a true and correct copy of the Supplemental To Appeal, Volume I, in cause number SC00-2290, encompassing Tab #QQ, and is herein incorporated by reference;

11. Respondent's Exhibit 11 is a true and correct copy of petitioner's Initial Brief Of Appellant in cause number SC00-2290, encompassing Tab #SS, and is herein incorporated by reference;

12. Respondent's Exhibit 12 is a true and correct copy of the petitioner's Appendix To Initial Brief Of Appellant in cause number SC00-2290, and is herein incorporated by reference;

13. Respondent's Exhibit 13 is a true and correct copy of the State's Answer Brief Of Appellee in cause number SC00-2290, encompassing Tab #TT, and is herein incorporated by reference;

14. Respondent's Exhibit 14 is a true and correct copy of petitioner's Appellant's Reply Brief in cause number SC00-2290, and is herein incorporated by reference;

15. Respondent's Exhibit 15 is a true and correct copy of petitioner's Amended Petition For Writ Of Habeas Corpus, cause number SC01-674, and is herein incorporated by reference;

16. Respondent's Exhibit 16 is a true and correct copy of petitioner's Appendix To Amended Petition For Writ Of Habeas Corpus, cause number SC01-674, and is herein incorporated by reference;

17. Respondent's Exhibit 17 is a true and correct copy of the State's Response To Amended Petition For Writ Of Habeas Corpus in cause number SC01-674, and is herein incorporated by reference;

18. Respondent's Exhibit 18 is a true and correct copy of petitioner's Reply To Response To Amended Petition For Writ Of Habeas Corpus in cause number SC01-674, and is herein incorporated by reference;

19. Respondent's Exhibit 19 is a true and correct copy of the Opinion of the Florida Supreme Court in causes SC00-2290 and SC01-674, dated October 17, 2002, encompassing Tab #UU, and is herein incorporated by reference; and

20. Respondent's Exhibit 20 is a true and correct copy of the Mandate of the the Florida Supreme Court in causes SC00-2290 and SC01-674, dated November 18, 2002, and is herein incorporated by reference.

Statement of Issues

Petitioner states the following grounds in his amended petition seeking federal habeas corpus relief [3]:

1. Ineffective Assistance of Trial Counsel, with the following subparts:

A. Defense counsel admitted without petitioner's knowledge or acquiescence that petitioner was guilty of something;

B. Defense counsel failed to advise petitioner of his right to testify;

C. Defense counsel failed to present sufficient testimony as to fetal alcohol syndrome, the extent of petitioner's addictions to alcohol and drugs, and the effect of drugs on petitioner the day of the murder;

D. Defense counsel failed to effectively investigate or effectively present the defense of intoxication;

E. Defense counsel failed to present adequate evidence of petitioner's emotional state, mental state, intelligence, and mental deficiencies as to the guilt phase, in respect to whether defendant knowingly waived his rights, and as to penalty phase mitigation;

F. Defense counsel failed to object to the State's opening statement as to the charge of robbery;

G. Defense counsel failed to move for a mistrial at the penalty phase when the State made burden shifting comments;

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[3] Through appointed counsel, an amended petition was filed on September 8, 2003. Previously, petitioner filed a pro se petition on March 11, 2003, which did not include all of the issues now presented in the amended petition. Respondent addresses the implication of this distinction, *infra*, at 15-20.

H. Defense counsel was inadequately prepared for the penalty phase and no co-counsel was requested or appointed;

I. Defense counsel was ineffective when he stated that petitioner's co-defendant was not to be held to the same degree of culpability;

J. Appellate defense counsel failed to raise any issues as to the guilt phase, including suppression and unconstitutionality of the death penalty;

K. Defense counsel failed to object to burden shifting State arguments that were comments on petitioner's failure to testify;

L. Defense counsel was ineffective for waiving at trial the issues of suppression;

M. Trial and appellate counsel were ineffective for not raising the comment by the State's witness that he knew petitioner since he got out of prison;

N. Defense counsel was ineffective for entering into a written stipulation as to the identity of the body located by police;

2. Neither the trial court nor the Florida Supreme Court engaged in an adequate proportionality review as to petitioner's sentence in comparison to that of his co-defendant's;

3. Florida's death penalty scheme is unconstitutional as it does not require a unanimous verdict, the judge imposes the sentence, and the jurors are told that their role is advisory;

4. "The Court and all parties to the litigation have a heightened duty to the defendant when it is apparent that he does not understand or even recall those things which are happening or have happened in his prosecution, or he is emotionally impaired"; and

5. The trial court failed to permit evidence or allow argument on the following:

A. The jury selection procedure in Santa Rosa County does not yield a fair cross section and assures that the resulting jury is the result of purposeful discrimination;

B. That it was a denial of due process not to grant a mistrial when the State's witness testified that he had known petitioner since he got out of prison;

C. That Florida's death penalty scheme is unconstitutional as applied in this case in that it permits the aggravating factor "under a sentence of imprisonment" when the defendant is on conditional release;

D. That petitioner's state postconviction relief counsel was forced to prepare and proceed on petitioner's motion for postconviction relief without provision of all state public records;

E. That it was a denial of due process when petitioner's jury was given an erroneous expert witness jury instruction;

F. That the Florida courts used incorrect law in establishing the aggravating circumstances and that petitioner is innocent of the death penalty; and

G. That Florida's death penalty scheme is unconstitutional on its face and as applied.

Statement of Procedural History

On May 5, 1995, Lawrence was sentenced to death in accord with the jury's 9-3 vote recommending death upon his conviction for first-degree murder. Respondent's Exhibit 2-II, at 239, 242. The Circuit Court for the First Judicial Circuit in and for Santa Rosa County, Florida also sentenced Lawrence to two concurrent terms of five years imprisonment for his

conspiracy to commit murder and auto theft convictions, and to time served for the petty theft conviction. Respondent's Exhibit 2-II, at 240, 245, 248. Petitioner sought direct review by the Florida Supreme Court, Respondent's Exhibit 3, which affirmed petitioner's judgment of conviction and sentence on August 28, 1997. Respondent's Exhibit 6 (reported at *Lawrence v. State*, 698 So. 2d 1219 (Fla. 1997)). The United States Supreme Court thereafter denied Lawrence's petition for writ of certiorari on January 20, 1998. Respondent's Exhibit 7 (reported at *Lawrence v. Florida*, 522 U.S. 1080 (1998)).

Petitioner subsequently filed his initial motion for postconviction relief on January 19, 1999, Respondent's Exhibit 9-I, at 1, and an amended motion was filed on April 22, 1999. Respondent's Exhibit 9-I, at 21. An order denying Rule 3.850 state postconviction relief was entered on October 11, 2000. Respondent's Exhibit 9-II, at 192. Petitioner appealed to the Florida Supreme Court, Respondent's Exhibit 11, which affirmed the denial of postconviction relief on October 17, 2002. Respondent's Exhibit 19 (reported at *Lawrence v. State*, 831 So. 2d 121 (Fla. 2002)). That court issued its mandate on November 18, 2002, Respondent's Exhibit 20, and the United States Supreme Court denied Lawrence's petition for writ of certiorari on March 24, 2003. *Lawrence v. Florida*, 123 S.Ct. 1575 (2003).

Lawrence filed his initial petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on March 11, 2003, and following the appointment of counsel, filed through counsel an amended petition on September 8, 2003.

Statement of State Court Findings of Fact

As found by the Florida Supreme Court, following are the presumptively-correct state court findings of fact:

> Shortly after Gary and Brenda Lawrence were married, they separated, and another man, Michael Finken,

moved in with Brenda and her two daughters, Stephanie and Kimberly Pitts, and Stephanie's friend, Rachel Matin. On the day of the murder, July 28, 1994, Gary and Michael drove Brenda to work and then drank beer at a friend's house. Later, Gary and Michael picked Brenda up and the three returned to the friend's house where they drank more beer. After the three returned to Brenda's apartment, Gary and Michael argued and Gary hit Michael when he learned that Michael had been sleeping with Brenda. Gary and Michael seemed to resolve their differences, and Michael fell asleep on the couch. Gary and Brenda conversed, and Brenda went through the house collecting weapons—including a pipe and a baseball bat. Gary and Brenda told Kimberly and Rachel that they were "going to knock off Mike." Gary told Kimberly to "stay in your bedroom no matter what you hear."

The trial court described what happened after Gary and Brenda spoke to the girls:

> Thereafter, the two girls heard what they described as a pounding sound. At one point, Rachel Matin stated that she heard the victim say, "stop it, if you stop, I'll leave." She stated that she heard that statement several times. Kimberly Pitts stated she heard the victim say "please don't hit me, I'm already bleeding." The victim's pleas, however, were met with more pounding. Once the pounding stopped, the girls were required to assist in the clean up and described to the jury what they observed. Kimberly stated that much of the victim's right side of his face was missing and his chin was knocked over to his ear. Rachel Matin stated that there was no skin left on the victim's face and part of his nose was missing. Apparently the victim was still alive. Kimberly observed her mother coming out of the kitchen area with what appeared to be a

> dagger and then, although not seeing the dagger in her hand at the time, observed her mother make a stabbing motion toward the victim with something in her hand.
>
> It was at that time when Brenda Lawrence requested that the girls obtain the assistance of Chris Wetherbee. Upon his entrance into the home, Cris Wetherbee observed the victim's head being caved in, blood all over, the victim's eyeball protruding approximately three inches and a mop handle shoved into the victim's throat. Wetherbee asked Gary Lawrence, "what's going on?" At which time the Defendant responded by pulling out the mop handle and kicking the victim and making the statement "this is what's going on." Immediately after removing the mop handle from the victim's throat, Wetherbee heard the victim give approximately three or four ragged breaths at which time the victim thereafter stopped breathing and apparently expired. The Defendant, Gary Lawrence, told Wetherbee that he had beat him with a pipe until it bent and then beat him with a baseball bat.

Chris Wetherbee summarized the victim's state: "And [he] looked like something off of one of the real good horror movies." Gary and Brenda then removed a small amount of money from Michael's pockets, wrapped the body in a shower curtain and placed the body in Michael's car, and Gary drove to a secluded area where he set the body afire. When Gary returned home, he and Brenda danced.

Gary Lawrence was arrested later that evening driving Michael's car and subsequently confessed, admitting that he had beaten Michael because Michael had been sleeping with Brenda. Lawrence was charged with first-degree murder, robbery, grand theft of a motor vehicle, and conspiracy to commit murder. At trial, the medical

examiner testified as follows: Michael died of blunt trauma and possible asphyxia; Michael was alive when the mop handle was thrust down his throat; Michael's blood alcohol level was very high; and one or more of the blows to Michael's head could have caused loss of consciousness. Lawrence was convicted of first-degree murder, conspiracy to commit murder, auto theft, and petty theft.

During the penalty phase, Lawrence presented testimony of a brother, a psychologist, and a psychiatrist. The court followed the jury's nine-to-three vote and imposed a sentence of death based on three aggravating circumstances,[1] no statutory mitigating circumstances, and five nonstatutory mitigating circumstances.[2] Lawrence also was sentenced to concurrent five-year terms of imprisonment on the conspiracy and auto theft charges and time served on the petty theft charge. (Brenda was tried separately and sentenced to life imprisonment for her role in the crimes.). . . .

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[1] The court found that the murder had been committed while Lawrence was under sentence of imprisonment; that the murder was heinous, atrocious, or cruel (HAC); and that the murder was committed in a cold, calculated, and premeditated manner (CCP).

[2] The court found that Lawrence cooperated with police; Lawrence had a learning disability and low IQ; Lawrence had a deprived childhood; Lawrence was under the influence of alcohol at the time of the crimes; and Lawrence does not have a violent history.

Respondent's Exhibit 6, at 1-2 (reported at *Lawrence*, 698 So. 2d at 1220-1221).

- *Statement of Untimeliness*

I. Pro Se Habeas Petition Filed On March 11, 2003

Pursuant to 28 U.S.C. § 2244(d)(1), effective April 24, 1996, "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody

pursuant to the judgment of a State court." Because petitioner filed his initial petition on March 11, 1998[4], subsequent to the effective date of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), the time limitation period under § 2244(d)(1) applies. Accordingly, petitioner had one year from the date his direct appeal became final to file his federal petition. *Webster v. Moore*, 199 F.3d. 1256, 1258 n.3 (11th Cir.), *cert. denied*, 531 U.S. 991 (2000). However, the one-year statute of limitations is tolled "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending . . . ." *Id.* at 1257 (*quoting* § 2244(d)(2)).

Petitioner's conviction became final for purposes of 28 U.S.C. § 2244(d) on January 20, 1998, when the United States Supreme Court denied his petition for writ of certiorari. *Smith v. Bowersox*, 159 F.3d 345, 348 (8th Cir. 1998), *cert. denied*, 525 U.S. 1187 (1999) ("[T]he running of the statute of limitations imposed by § 2244(d)(1)(A) is triggered by either (i) the conclusion of all direct criminal appeals in the state system, followed by either the completion or denial of certiorari proceedings before the United States Supreme Court; or (ii) if certiorari was not sought, then by the conclusion of all direct criminal appeals in the state system followed by the expiration of the time allotted for filing a petition for the writ."); *see also Clay v. United States*, 537

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[4] While petitioner's pro se petition was received by the clerk's office on March 13, 2003, his "Certificate Of Service" is dated March 11, 2003, the same date filing is reflect on the Civil Docket For Case #: 03-CV-97 obtained from the PACER system. Apparently pursuant to the prisoner mailbox rule, *Houston v. Lack*, 487 U.S. 266, 275 (1988), the petition was deemed filed on March 11, 2003. *Cf. Adams v. United States*, 173 F.3d 1339, 1341 (11th Cir. 1999) (applying the mailbox rule to pro se filings of motions under 28 U.S.C. § 2255); *accord Nichols v. Bowersox*, 172 F.3d 1068, 1077 (8th Cir. 1999) (en banc) (for purposes of 28 U.S.C. § 2244(d)(1), a pro se habeas petition is deemed filed when placed into the prison mail system).

U.S. 522, 531 (2003) ("The words 'by the conclusion of direct review or the expiration of the time for seeking such review' make it clear that finality for the purpose of § 2244(d)(1)(A) is to be determined by reference to a uniform federal rule."); *Bond v. Moore*, 309 F.3d 770, 774 (11th Cir. 2002) (petitioner's state conviction did not become final for purposes of § 2244(d)(1) until the ninety-day period that he had to file for certiorari review in the United States Supreme Court expired, where petitioner did not seek such discretionary review); *but see Tinker v. Moore*, 255 F.3d 1331, 1333 (11th Cir. 2001) (for purposes of § 2244(d)(1), "[u]nder Florida law, a judgment against a criminal defendant becomes final upon issuance of the mandate on his direct appeal."), *cert. denied*, 534 U.S. 1144 (2002).

While petitioner's conviction thus became final for purposes of § 2244(d)(1) on January 20, 1998, pursuant to 28 U.S.C. § 2244(d)(2), the period in which his timely application for postconviction relief under Florida Rule of Criminal Procedure 3.850 was pending tolled the running of the limitation period. Here, petitioner filed his postconviction motion on January 19, 1999 (Respondent's Exhibit 9-I, at 1), after 364 days of the one-year period ran. The limitation period was then tolled from January 19, 1999 to November 18, 2002, when the Florida Supreme Court issued its mandate (Respondent's Exhibit 20), having previously affirmed the denial of postconviction relief (Respondent's Exhibit 19). *Carey v. Safford*, 536 U.S. 214, 219-220 (2002) ("[A]n application is pending as long as the ordinary state collateral review process is 'in continuance'—i.e., 'until the completion of' that process. In other words, until the application has achieved final resolution through the State's post-conviction procedures, by definition it remains 'pending.'"); *cf. Nyland v. Moore*, 216 F.3d 1264, 1267 (11th Cir. 2000) ("In Florida, a state court of appeals' order denying a rehearing on its affirmance of the state trial court's denial of a motion for post-conviction relief is pending until the mandate issues.");

see also Coates v. Byrd, 211 F.3d 1225, 1227 (11th Cir. 2000) ("We agree with the Tenth and Fifth Circuits that the time during which a petition for writ of certiorari is pending, or could have been filed, *following the denial of collateral relief in the state courts*, is not to be subtracted from the running of time for 28 U.S.C. § 2244(d)(1) statute of limitations purposes.") (emphasis added), *cert. denied*, 531 U.S. 1166 (2001). Accordingly, following the tolling under § 2244(d)(2) when the postconviction relief motion was no longer pending, petitioner's habeas petition was due within one day, on November 19, 2002. Because the initial petition was not filed until March 11, 2003, nearly four months later, it is time-barred.

Because § 2244(d) is a limitation period, it may be subject to equitable tolling. *See Wyzykowski v. Department of Corrections*, 226 F.3d 1213, 1216 n.2 (11th Cir. 2000). "The burden of establishing entitlement to this extraordinary remedy plainly rests with the petitioner." *Drew v. Dept. of Corrections*, 297 F.3d 1278, 1286 (11th Cir. 2002), *cert. denied*, 537 U.S. 1237 (2003). Petitioner, however, does not acknowledge that he is time-barred, and thus fails to offer any basis for tolling the limitation period, thereby failing to meet his burden.

"Federal courts have typically extended equitable relief only sparingly . . . [including] situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 96 (1990). "In asking the court to equitably toll the statute of limitations, [petitioner] requests a judicially-crafted remedy that has *always* been reserved only for parties who have pursued their rights diligently and whose untimeliness is due entirely beyond their control." *Drew*, 297 F.3d at 1291 n.5 (emphasis in original). Thus equitable tolling affords the otherwise time-barred peti-

tioner an exceedingly narrow window of relief; "[e]quitable tolling is proper only when extraordinary circumstances *beyond a prisoner's control* make it *impossible* to file a petition on time. . ." *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000) (holding that capital habeas petitioner was time-barred under § 2244(d) and finding no basis for applying equitable tolling) (emphasis added), *cert. denied*, 534 U.S. 863 (2001); *Sneed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000) (equitable tolling is available "when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence.") (internal quotation marks and citation omitted).

Respondent does not believe that petitioner acted diligently or that there existed exceptional circumstances beyond petitioner's control preventing him from timely seeking habeas relief, and because petitioner does not acknowledge that his petition is untimely, he offers no basis for this Court to apply equitable tolling. Instead, it appears that petitioner was under the erroneous impression that his petition was due "one day after denial of certiorari" from the appeal affirming the denial of postconviction relief. *See* Pro Se Petition, at ¶ 13. As noted *supra*, at 13, however, the time during which a petition for writ of certiorari is pending following the denial of collateral relief in the state courts is not to be subtracted from the running of the limitation period. *Coates*, 211 F.3d at 1227. Nor does erroneous advice by counsel provide a basis for equitable tolling. *Helton v. Secretary for the Dept. of Corrections*, 259 F.3d 1310, 1313 (11th Cir. 2001), *cert. denied*, 535 U.S. 1080 (2002). The fact that this is a capital case neither requires nor provides a valid reason for reaching a different result. *Rouse v. Lee*, 339 F.3d 238, 253-254 (4th Cir. 2003) (en banc); *see also Kreutzer v. Bowersox*, 231 F.3d 460 (8th Cir. 2000) (death penalty case not accorded equitable tolling).[5]

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[5] In the event that petitioner may offer argument for the first time in his

Based upon the forgoing, filing of the habeas petition on March 11, 2003 renders the petition untimely and it should be dismissed with prejudice.[6]

II. Amended Habeas Petition Filed On September 8, 2003

Alternatively, even if the initial federal habeas petition filed on March 11, 2003 is deemed timely, the amended petition filed on September 8, 2003 clearly was filed after the running of the limitation period, and those claims not raised in the original petition that are presented in the amended petition are untimely as they do not relate back to the original pleading.

To the extent that petitioner may rely upon Rule 15(c) of the Federal Rules of Civil Procedure[7] and argue that the

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Traverse to the State's Response to invoke equitable tolling, Respondent respectfully requests the opportunity to respond to any such argument.

[6] In the event that the Court were to decide the threshold timeliness issue and determine that the petitioner is not time-barred under 28 U.S.C. § 2244(d), Respondent respectfully requests the opportunity to address the merits of the grounds raised and/or whether petitioner's grounds for relief are procedurally subject to review. *Cf. Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) ("A threshold question in every habeas case, therefore, is whether the court is obligated to apply the *Teague* rule to the defendant's claim. We have recognized that the nonretroactivity principle 'is not "jurisdictional" in the sense that [federal courts] . . . must raise and decide the issue sua sponte.' Thus, a federal court may, but need not, decline to apply *Teague* if the State does not argue it. **But if the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court must apply *Teague* before considering the merits of the claim.**") (emphasis added; internal citations omitted).

[7] Rule 15(c) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> (c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when . . . (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, ...

Court should hold that his amended petition "relates back" to the filing of the original petition, cases from the Eleventh Circuit Court of Appeals

> indicate that equitable tolling based on relation back is inappropriate. [That Court has] recognized that Rule 15(c) has been revised to prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense. *Pruitt v. United States*, 274 F.3d 1315, 1318 (11th Cir. 2001) (quoting Advisory Committee Note to 1991 Amendments to Rule 15). . . . Th[e] relatively narrow purpose of Rule 15(c) can be thwarted in the post-conviction context: the effective date of the claims made in amendments to habeas corpus petitions [would be] irrelevant, because if the claim could not be added by amendment, it could be asserted by subsequent petition that would not be barred by any limitations period. . . . *Pruitt*, 274 F.3d at 1318.

Jones v. United States, 304 F.3d 1035, 1042 (11th Cir. 2002) (internal footnote and quotation marks omitted). In *Dean v. United States*, 278 F.3d 1218 (11th Cir. 2002), the Eleventh Circuit discussed the relation back doctrine as follows:

> Recognizing that this Court had not yet reviewed a Rule 15(c) petition in the context of a habeas corpus petition, we took guidance from other circuits in developing the rule:
>
> > This Court has not addressed Rule 15(c) in the context of a § 2255 motion. However, three circuits have addressed this precise issue. All three circuits held that for an untimely § 2255 claim to "relate back" under Rule 15(c), the untimely claim must have more in common with the timely filed claim than the mere fact that they arose out of the same trial and sentencing proceedings. *See United States v. Pittman*,

> 209 F.3d 314 (4th Cir. 2000); *United States v. Duffus*, 174 F.3d 333 (3d Cir.), *cert. denied*, 528 U.S. 866, 120 S. Ct. 163, 145 L. Ed. 2d 138 (1999); *United States v. Craycraft*, 167 F.3d 451 (8th Cir. 1999). Instead, in order to relate back, the untimely claim must have arisen from the "same set of facts" as the timely filed claim, not from separate conduct or a separate occurrence in "both time and type." *Pittman*, 209 F.3d at 318 ("both time and type"); *Duffus*, 174 F.3d at 337 ("same set of facts"); *Craycraft*, 167 F.3d at 457 ("same set of facts" and "both time and type").

217 F.3d at 1344.

> The key consideration is that the amended claim arises from the same conduct and occurrences upon which the original claim was based. This may be the case even if one or both claims do not explicitly state supporting facts. When the nature of the amended claim supports specifically the original claim, the facts there alleged implicate the original claim, even if the original claim contained insufficient facts to support it. One purpose of an amended claim is to fill in facts missing from the original claim. Applying this rule to the instant case, we hold that three of Dean's amended claims on appeal expand the facts, and serve to further specify his original claims. This is precisely the sort of amendment contemplated by Rule 15(c).

Dean, 278 F.3d at 1222. In respect to Rule 15(c) of the Federal Rules of Civil Procedure, there is no basis for treating § 2254 habeas petitions differently from those brought by federal prisoners under § 2255. *Cf. Bond*, 309 F.3d at 774 ("[T]he limitations provisions under the two statutes are virtually identical. Section 2255 says the limitation period shall run from 'the date on which the judgment of conviction becomes final.' 28 U.S.C. § 2255(1). Section 2244(d) says the limitation period shall run from 'the date on which the

judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.' 28 U.S.C. § 2244(d)(1)(A)," and interpreting § 2244(d)(1) in accord with § 2255(1) as discussed in *Kaufmann v. United States*, 282 F.3d 1336, 1339 (11th Cir.), *cert. denied*, 537 U.S. 875 (2002)).

Petitioner's amendment to the original petition did not cure a technical defect but in effect evades the limitation period by raising new claims. Indeed, petitioner's claims in the amended petition asserted as Grounds 1M, 1N, 2, 3, 4, and 5A-5G did not arise out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.[8] *Accord Davenport v. United States*, 217 F.3d 1341,

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[8] Issues raised in the original habeas petition included the following:

1. Ineffective assistance of counsel, as follows:

A. Defense counsel admitted without petitioner's knowledge or acquiescence that petitioner was guilty of something;

B. Defense counsel failed to sufficiently prepare for trial and failed to present adequate evidence of petitioner's mental deficiency and longstanding use of alcohol and drugs, and the defense of intoxication was ineffectively presented;

C. Defense counsel failed to advise petitioner of his right to testify so that the jury was unaware of petitioner's longstanding alcohol and drug use and at the time of the offense, as well as failing to raise or explore fetal alcohol syndrome;

D. Defense counsel failed to pursue or utilize expert testimony as to petitioner's impairment from alcohol or drugs;

E. Defense counsel failed to object to evidence of a robbery to support felony murder where the State did not have sufficient evidence to argue felony murder in its opening statement, and failed to have proper instructions on felony murder (robbery) given;

F. Defense counsel failed to pursue or present adequate evidence of petitioner's extreme or emotional disturbance, and the experts utilized failed to establish petitioner's inability to validly waive his rights and the level of alcohol impairment at both the guilt and

1346 (11th Cir. 2000) (raising different factual bases for claims of ineffective assistance of counsel), *cert. denied*, 121

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penalty phases of trial;

G. Defense counsel failed to object or move for a mistrial when the State's argument shifted the burden of proof as to the defenses of intoxication and mental impairment;

H. Defense counsel inadequately prepared for the penalty phase as he was not assisted by co-counsel, and the failure to have co-counsel appointed was a violation of due process;

I. Defense counsel was ineffective for arguing that the defense had never disputed petitioner's guilt and had never suggested that petitioner's co-defendant should be held to the same degree of accountability as petitioner;

J. Defense counsel failed to move for a mistrial upon the introduction of hearsay to support the robbery theory for felony murder, and the State's argument on felony murder without a limiting instruction violated due process;

K. Defense counsel failed to object and move for a mistrial, and direct appeal defense counsel failed to raise "these issues."

L. Direct appeal defense counsel failed to raise any issue as to the guilt phase of trial on appeal, including rulings on the motions to suppress and the constitutionality of Florida's death penalty;

M. Defense counsel failed to object or move for a mistrial wherein the State argued that the evidence was uncontroverted, thus commenting on petitioner's failure to testify;

N. Defense counsel ineffectively waived the suppression issues at trial;

2. Denial to an impartial jury; and

3. Florida's death penalty scheme is unconstitutional on its face and as applied.

Issues 1M, 1N, 2, 3, 4, and 5A-5F of the amended petition clearly were not raised in the pro se petition. Issue 5G in the amended petition, while similar to issue 3 in the pro se petition, presents a distinct legal basis for relief: that Florida's capital punishment scheme is unconstitutional versus that the trial court failed to permit evidence or allow argument on the underlying issue.

S.Ct. 1232 (2001); *see also United States v. Duffus*, 174 F.3d 333, 337 (3rd Cir.) (ineffective assistance of counsel for failing to raise an issue on appeal and for failing to object at sentencing to the sentencing guideline invoked versus failing to move to suppress evidence), *cert. denied*, 528 U.S. 866 (1999); *United States v. Pittman*, 209 F.3d 314, 317-318 (4th Cir. 2000) (lack of jurisdiction to enhance sentence, improper enhancement based on prior conviction, and insufficient proof that drug was crack cocaine versus ineffective assistance of appellate counsel and improper enhancement for obstruction of justice); *United States v. Craycraft*, 167 F.3d 451, 456 (8th Cir. 1999) (ineffective assistance for failing to file an appeal versus ineffective assistance premised upon failure to seek a downward departure or object to the type of drugs involved).

Based upon the foregoing, to permit petitioner the benefit of Rule 15(c)(2) is to create an exception to the statute of limitations not otherwise contemplated under the Rules of Civil Procedure or AEDPA. *See Harris v. Nelson*, 394 U.S. 286, 293-294, 295-298 (1969) (while "habeas corpus proceedings are characterized as 'civil' . . . . the label is gross and inexact," and holding that Rules 26 and 33 of the Federal Rules of Civil Procedure do not completely and automatically apply in habeas proceedings); *see also Fuller v. Marx*, 724 F.2d 717, 720 (8th Cir. 1984) ("The rule does not contemplate depriving defendants of the protection of the statute of limitations."). At the very least, then, Grounds 1M, 1N, 2, 3, 4, and 5A-5G of the amended petition are time-barred. *Compare Mederos v. United States*, 218 F.3d 1252, 1254 (11th Cir. 2000) (amended § 2255 motion raised identical claims as raised in pro se motion and thus relation back permitted).

Statement of Exhaustion

As discussed *supra*, at 15 n.6, Respondent does not waive this issue and respectfully requests the opportunity to address whether petitioner has complied with the exhaustion

requirement under 28 U.S.C. § 2254(b) in the event the Court were to conclude that the habeas petition is not time-barred.

Statement of Procedural Bar

As discussed *supra*, at 15 n.6, Respondent does not waive this issue and respectfully requests the opportunity to address whether petitioner has properly presented all of his federal claims before the state courts in the event the Court were to conclude that the habeas petition is not time-barred.

Statement of Noncognizability

As discussed *supra*, at 15 n.6, Respondent does not waive this issue and respectfully requests the opportunity to address whether petitioner's claims present federal constitutional grounds in the event the Court were to conclude that the habeas petition is not time-barred.

Statement of Merits

As discussed *supra*, at 15 n.6, Respondent does not waive this issue and respectfully requests the opportunity to address the merits of any exhausted, non-defaulted cognizable claims in the event the Court were to conclude that the habeas petition is not time-barred.

Conclusion

WHEREFORE, for the reasons herein stated, Respondent prays this Court dismiss the petition for writ of habeas corpus without further judicial proceedings.

Respectfully submitted,

CHARLES J. CRIST, JR.
Attorney General

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed, postage prepaid, this 12th day of January, 2004, to[9]:

Mary Catherine Bonner, Esq.
918 Lantana Ave.
Clearwater Beach, FL 33767

/s/ Cassandra K. Dolgin
CASSANDRA K. DOLGIN

[9] Undersigned counsel contacted counsel for petitioner who advised that she would be at the above-listed address until January 31, 2004, and thus the reason for service of the foregoing to that address rather than counsel's address listed in petitioner's pleadings, 207 S.W. 12th Court, Ft. Lauderdale, FL 33315-1522.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NO. 3:03CV97-rh

GARY LAWRENCE,
Petitioner,

v.

JAMES V. CROSBY,
Respondent.

Petitioner's Motion in Opposition to the State's Order-to-show-cause Response And Motion for Equitable Relief

I.

Circuits disagree about whether the statute of limitations is tolled under §§ 2244(d) during the pendency of a certiorari petition, following the denial of post-conviction relief. Lawrence, who is nearly mentally retarded, filed a pro se Petition that would have been automatically accepted as timely in some jurisdictions—but not this one. The issue here isn't Lawrence's diligence but a statutory interpretation puzzle that challenges even great minds.

What should be Lawrence's penalty for guessing wrong?

Title *28 U.S.C. § 2244(d)(1)* provides a one-year period of limitations for people "in custody pursuant to the judgment of a State court" to file an application for a writ of habeas corpus. Title *28 U.S.C. § 2244(d)(2)* provides for tolling of this one-year period as follows:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Between January 1999 and November 2002, Lawrence sought post-conviction relief in Florida courts. The limitations period was clearly tolled during this time because Lawrence's state collateral relief motions were pending in the various state courts.[1] In *Carey*, the Court held that "until the application has achieved final resolution through the State's post-conviction procedures, by definition it remains 'pending'"[2] But it is not at all so clear whether the one-year statute of limitations applicable to federal habeas corpus petitions is also tolled during the period in which a petitioner may seek, and the United States Supreme Court considers, whether to grant, certiorari review of the denial of the petitioner's state collateral relief motion.

Respondent argues that the habeas petition at issue was filed four months after the statute of limitations expired. And although acknowledging the limitation period may be subject to equitable tolling, Respondent further argues that Lawrence did not act with sufficient diligence nor does there exist an exceptional circumstance beyond Lawrence's control that would support equitable relief here. To the contrary the Petition is timely and if this court is unpersuaded on this point, then equitable tolling is an appropriate remedy here.

There is disagreement among the courts of appeal on the question whether a petition for certiorari to the U.S. Supreme Court following the denial of state post-conviction relief tolls the limitations period. One position is that unlike the situation

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[1] *See Carey v. Saffold, 536 U.S. 214, 220, 153 L. Ed. 2d 260, 122 S. Ct. 2134 (2002).*

[2] *Id.*

with direct review, the tolling provision does not apply to the time when a petition for certiorari to the U.S. Supreme Court is pending or to the 90-day interval during which such a petition can be filed.

This counterintuitive interpretation was taken by the Eleventh Circuit in 2000, which wrote in a two page decision

> We agree with the Tenth and Fifth Circuits that the time during which a petition for writ of certiorari is pending, or could have been filed, following the denial of collateral relief in the state courts, is not to be subtracted from the running of time for *28 U.S.C. 2244(d)(1)* statute of limitations purposes.[3]

The argument is that time bar is justified by the statutory language and by the underlying purpose of the tolling provision. Section 2244(d)(1) includes the phrase "conclusion of direct review," a term that is it generally agreed includes review by the U.S. Supreme Court. By contrast, Section 2244(d)(2) provides for tolling during state collateral review only while the "State post-conviction or other collateral review . . . is pending." The argument goes that there is no textual basis for interpreting Section 2244(d)(2) to include a federal appeal of collateral issues because "pending" does not conjure up in some minds the specter of federal review with the same intensity as the phrase "conclusion of direct review." That is the argument against tolling in a nutshell.

Three years after the Eleventh Circuit gave us these reasons for not tolling, the Sixth Circuit, sitting en banc, reached the opposite conclusion. In that Court's view, the difference in language between subsections (d)(1) and (d)(2) doesn't matter. Instead, the court found the language of subsection (d)(2) resolves the situation conclusively. The court reasoned that the tolling provision requires that the application for state post-conviction relief be *pending*, not

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[3] *Coates v. Byrd*, 211 F.3d 1225, 1227.

that it be pending in *state court*. So while the petition for certiorari is pending before the U.S. Supreme Court, it satisfies the statutory requirement even though the state petition is no longer pending in state court.

In *Abela v. Martin*,[4] a lengthy and well-reasoned opinion, the court concluded that an application for state collateral review was "pending" for purposes of the tolling provision of § 2244(d)(2) regardless of whether it was being considered on appeal by a state court or by the United States Supreme Court on certiorari. The Court analyzed the word "pending" at length,

> While the *application* is one for *State* post-conviction relief, just as state criminal proceedings can raise federal issues reviewable in the United States Supreme Court, so can state habeas proceedings. A state criminal proceeding . . . is still "pending" even though the state courts are finished with it, until any petition filed is finally decided. Similarly, if there is a certiorari petition pending to review the validity of the state's denial of such an application for state post-conviction review, the *application* is still "pending"—that is, not finally decided. The application does not thereby stop being a state habeas proceeding or turn into a federal rather than a state application; it is just not finally decided yet.[5]

Positions contrary to tolling are premised on misapprehension of the statute. Chiefly, the Tenth Circuit felt and the Eleventh agreed that "A petition for writ of habeas corpus to the United States Supreme Court is not an application for state post-conviction review of any kind; it is neither an application for state post-conviction review nor an application

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[4] 348 F.3d 164 (6th Cir. 2003).

[5] *Abela* at 170 (citing with approval the reasoning of the dissent in *White v. Klizkie*, 282 F.3d 920, 927-927 (9th Cir. 2002)(Quotations omitted).

for other state collateral review." As the dissent pointed out in *White v. Klizkie*, "The United States Supreme Court . . . can consider state . . . cases when they raise federal issues. Otherwise, what is the United States Supreme Court hearing when it considers a state habeas petition on certiorari. Not an application for federal post-conviction or other collateral review."[6]

The court in *Abela* clarifies and corrects the Tenth and Eleventh circuits' misapprehension Supreme Court certiorari review of state collateral claims:

> The focus of section 2244(d)(2) is not on the court in which the application is pending but on the application itself. As long as the petition for certiorari involves an application for state court relief, section 2244(d)(2) requires that the statute of limitations be tolled. The court where the application is pending is irrelevant.[7]

Moreover, that the federal review process of a properly filed state application for state post-conviction or other collateral review is not itself a state application is patently irrelevant.

The Sixth Circuit further explained that to require a petitioner to file his petition seeking federal habeas corpus relief before he has sought certiorari to the Supreme Court does not promote the finality of state court determinations and encourages the simultaneous filing of two actions seeking essentially the same relief—thereby raising concerns about comity and exhaustion. The Sixth Circuit continued, "We doubt that Congress intended, in the Anti-Terrorism and Effective Death Penalty Act, to force prisoners to choose between federal habeas relief and seeking certiorari to the Supreme Court, or to do both simultaneously."[8]

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[6] 282 F.3d 920, 927-927 (9th Cir. 2002).

[7] *Abela* at 170.

[8] Abela at 171.

Wherefore we request on the strength and logic of this new reasoning, apparently yet to be considered by the Eleventh Circuit as an alternative to the unnecessarily restrictive reading of the statute found in *Coates*, that this Court reject Respondent's argument that Lawrence's Petition is untimely.

II.

The lack of clarity in the relevant law and plausibility of a Lawrence's legal theory are sufficient grounds for equitable tolling.

In the event that this Court is disinclined to accept the Petition as timely, Lawrence requests equitable tolling.

In *Fahy*, a case where the petition was thirty-five days late due to attorney error in interpreting debatable procedural provisions, the Third Circuit tolled the precise statute at issue here, applying equitable tolling in a capital case involving a petitioner convicted of murdering thirteen people.[9] The *Fahy* court reasoned that a court "must allow less than 'extraordinary' circumstances to trigger equitable tolling of the AEDPA's statute of limitations when a [capital] petitioner has been diligent in asserting his or her claims and rigid application of the statute would be unfair."[10]

There is no question that courts disagree about the tolling of the statute during federal review of collateral state claims. And not only is Lawrence's legal theory plausible, it is so sound and sensible that Lawrence's position is the law every-

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[9] *Fahy v. Horn, 240 F.3d 239, 245 (3d Cir. 2001) (cert. denied, 534 US. 944, 151 L. Ed. 2d 241, 122 S. Ct. 323 (2001); accord Banks v. Horn, 271 F.3d 527, 534-35 (3d Cir. 2001), rev'd on other grounds, 536 US. 266, 153 L. Ed. 2d 301, 122 S. Ct. 2147 (2002).*

[10] *Fahy, 240 F.3d at 245; see also Corjasso v. Ayers, 278 F.3d 874 (9th Cir. 2002)* (tolling AEDPA's statute of limitations despite a procedural defect and listing cases); *Lagrone v. Cockrell, 2002 U.S. Dist. LEXIS 15456, 2002 WL 1968246, at *8-9 (N.D. Tex. Aug. 19, 2002); De Jesus v. Miller, 215 F. Supp. 2d 410, 412 (S.D.N.Y. 2002).*

where that the Sixth Circuit Court of Appeals enjoys jurisdiction.[11]

III.

Additionally, Equitable tolling is an appropriate remedy here because (1) counsel who advised Lawrence of the timing of his Petition was selected by and pre-qualified the State of Florida under its registry statute (2) Lawrence is nearly retarded and could not meaningfully participate in an agency relationship with counsel in any event and (3) Lawrence who faces death has a facially strong constitutional claim.

The Respondent argues that Lawrence failed to show that he pursued his rights diligently and that the untimeliness of his petition is due to extraordinary circumstances beyond his control. Also, Respondent posits that a petitioner seeking equitable tolling cannot claim to have relied on erroneous advice of counsel, doubtless relying on reasoning that concludes there is an agency relationship between post-conviction counsel and the defendant that makes counsel's errors attributable to the defendant.

Counsel's possible misapprehension of the law with regard to the time frame for filing Lawrence's pro se motion for federal habeas relief cannot be litigated as a matter of ineffectiveness. Although Mr. Lawrence disagrees, the law has not been revisited under the AEDPA and continues to be that The [sic] law is clear: an action taken by an attorney who represents a capital defendant in post-conviction capital collateral proceedings may not be the basis for a claim of ineffective assistance of counsel. Lawrence also acknowledges that erroneous advice of counsel does not generally form the basis of a successful application for equitable

[11] *Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003).

tolling.[12] But the law is equally clear with regard to the duty of the court in Florida where registry counsel has been assigned:

> The court *shall* monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation. The court shall also receive and evaluate allegations that are made regarding the performance of assigned counsel. The Chief Financial Officer, the Department of Legal Affairs, the executive director, or any interested person may advise the court of any circumstance that could affect the quality of representation, including, but not limited to, false or fraudulent billing, misconduct, failure to meet continuing legal education requirements, solicitation to receive compensation from the capital defendant, or *failure to file appropriate motions in a timely manner.*[13]

The court failed to properly monitor counsel and Lawrence because of his low mental facility had no capacity himself to monitor or evaluate registry counsel. This circumstance—State selected counsel that did not receive adequate court supervision—is an extraordinary circumstance beyond Lawrence's control that caused his Petition to be filed in March 2003.

It is impossible to overstate the significance of Lawrence's limited intelligence to the resolution of the issue of whether equitable tolling is warranted here. Lawrence's trial counsel recognized that Lawrence is "very, very slow."[14] In fact, experts opined that Lawrence's full scale IQ is 81—the lowest part of the low average range; however all of his other scores did not match what would be expected of someone

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[12] *Helton v. Secretary for the Department of Corrections*, 259 F.3d 1310, 1313 (11th Cir. 2001).

[13] Florida Statutes section 27.711(12).

[14] TR 46, 56.

with an IQ of 81. He never achieved anything more than a person in the borderline retarded range. He reads like an 11-year-old although he is over 40; his writing skills fall slightly under those of a 9 year old; his factual knowledge is that of an 11 year old.[15] He left school in the Seventh grade yet was unable to read; his IQ placed him in the lowest fifth percentile of children—only four out of one hundred children would place lower than he. The IQ correlates with the inability to process ideas; to plan; to understand; to appreciate relationships and to understand what goes on in daily life.[16] These facts render it impossible to conclude that Lawrence could ever puzzle out the statute of limitations requirements on his own or even meaningfully participate in an agency relationship with his lawyer, especially one concerning the bewildering complexity of the habeas corpus rules.

On June 20, 2002, the United States Supreme Court held in *Atkins v. Virginia*[17] that execution of the mentally retarded constitutes cruel and unusual punishment prohibited by the Eighth Amendment to the Constitution. Among other reasons the Court's stated: "Mentally retarded defendants may be less able to give meaningful assistance to their counsel . . . Mentally retarded defendants in the aggregate face a special risk of wrongful execution."[18] For the purpose of this pleading the [sic] this Court need not reach the issue of whether Lawrence is constitutionally ineligible for the death penalty but only whether Lawrence's deficient intelligence is a persuasive factor in considering his application for equitable tolling. This pleading seeks extremely limited relief. It is not about whether the Lawrence's Petition should be granted but merely asks that he be given the opportunity to explore before

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[15] Penalty Phase Transcript, pp. 42, 45, 47, 48.

[16] Penalty Phase Transcript, pp. 78, 79.

[17] 122 S.Ct. 2242 (2002).

[18] *Atkins* at 2251.

a United States District Court compelling evidence demonstrating defects in his prosecution.

Equitable tolling is "'a discretionary doctrine that turns on the facts and circumstances of a particular case'" and, therefore, "'does not lend itself to bright-line rules.'"[19] Although some statutes of limitations "serve policy interests that would be adversely affected if the statutory limitations provisions were not strictly adhered to," the habeas context is different, warranting greater flexibility in the application of the AEDPA's statute of limitations.[20] So, in deciding the appropriateness of an equitable remedy to toll the statute of limitations, case law requires a court to consider the "facts and circumstances of a particular case."[21]

A facially strong constitutional claim which questions the fundamental fairness of the very process by which a petitioner was convicted and sentenced "compels review regardless of procedural defaults."[22] The strength of the claim matters. In this federal habeas petition, his first, Lawrence, a prisoner under sentence of death, seeks relief on the basis of evidence that defense counsel's argument at trial operated as the functional equivalent to a guilty plea—a strategy that Lawrence neither explicitly nor affirmatively agreed to or

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[19] *Harris v. Hutchison, 209 F.3d 325, 330* (4th Cir. 2000) (quoting *Fisher v. Johnson, 174 F.3d 710, 713 (5th Cir. 1999)).*

[20] *Harris at 329.*

[21] *Harris at 330.*

[22] *Murray v. Carrier, 477 US. 478, 501 n.8, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986)* (Stevens, J., concurring); *see also Hensley v. Mun. Court, 411 U.S. 345, 349-50, 36 L. Ed. 2d 294, 93 S. Ct. 1571 (1973)* ("Habeas corpus is not a static, narrow, formalistic remedy, but one which must retain the ability to cut through barriers of form and procedural mazes. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." (internal quotation marks and citations omitted)).

indeed even understood. This claim of ineffective assistance is but one of many claims raised by Lawrence. And this claim alone would support granting the Writ. *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997) (affirming 864 F. Supp. 686 (M.D. Tenn. 1994)), cert. denied, 523 U.S. 1133 (1998) (Prejudiced presume [sic] because counsel did not serve as advocate and showed contempt for his client such that he was a "second prosecutor" and defendant would have been "better off to have been merely denied counsel." Defense counsel presented the most damaging evidence in the case.) *United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991) (Prejudicial per se when trial counsel concedes that there is no reasonable doubt concerning the only factual issues in dispute during closing arguments.) *Nixon v. State*, 28 Fla. L. Weekly S 597 (July 10, 2003)(Prejudice presumed where counsel conceded guilt in capital trial with only "silent acquiescence" at most from the defendant. That court held that an affirmative, explicit consent was required.) *Harvey v. State*, ___ So.2d ___, 2003 WL 21511339 (Fla. July 3, 2003). (Prejudice presumed where counsel conceded guilt in capital trial. "([E]ven in cases involving a confession," counsel cannot concede guilt without the client's consent.)

Nothing in the statute at issue here prevents this court from granting the very limited relief sought in this pleading by man [sic] who faces the death penalty. Nor has the Respondent argued prejudice nor is there a public policy concern at issue here. To the contrary, the Supreme Court itself has, "'in the interests of justice'," been willing to overlook requirements that it would ordinarily impose in non-capital cases.[23] For example, the requirement that an argument be raised below and in the certiorari petition, ordinarily prerequisites for Supreme Court review, has been characterize [sic] by the

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[23] *Eddings v. Oklahoma, 455 US. 104, 117, 71 L. Ed. 2d 1, 102 S. Ct. 869* n.* (1982) (O'Connor, J., concurring) (quoting *Wood v. Georgia, 450 U.S. 261, 265 n.5, 67 L. Ed. 2d 220, 101 S. Ct. 1097 (1981)).*

Court as merely "technical[ ]." [24] And more than that the Supreme Court stated unequivocally that it is the duty of a reviewing court to exercise great care before allowing a capital petitioner's initial claim for federal habeas relief to be summarily dismissed.[25]

Finally, Respondent argues (1) that the burden of establishing equitable tolling rests with the petitioner and (2) that Lawrence "doesn't acknowledge that he is time-barred and thus fails to offer any basis for tolling the limitation period, thereby failing to meet his burden."[26] A petitioner is compelled by neither logic nor law to move for equitable tolling until (and unless) the Respondent raised the time-bar question. Because the statute of limitations is an affirmative defense that is subject to waiver, Lawrence had no reason to anticipate or assist the Respondent by suggesting that the Respondent might elect to raise this defense. See, e.g., *Robinson v. Johnson*, 313 F.3d 128, 137 (3rd Cir. Nov. 2002) (opinion on panel rehearing) (affirmative defenses such as the statute of limitations "under the AEDPA should be treated the same as affirmative defenses in other contexts, and, if not pleaded in the answer, they must be raised at the earliest practicable moment thereafter" or be deemed waived.), *cert denied*, 2003 WL 553518 (Oct. 6, 2003); *Stewart v. Hendricks*, 2003 WL 21675345 (3rd Cir. July 18, 2003) (unpublished) (state's failure to even mention the limitations defense in any pleading thereby waived the defense; the court is "not persuaded" by the state's references to other circuits' decisions approving district courts' raising of the limitations issue

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[24] *Id.*

[25] *Lonchar, 517 US. at 324* (noting in a capital case that "dismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty" (emphasis in original) (citation omitted)).

[26] Response at 13.

sua sponte so long as the petitioner received notice and an opportunity to be heard.); *Scott v. Collins*, 286 F.3d 923 (6th Cir. 2002) (state's failure to raise issue of timeliness resulted in waiver of requirement under AEDPA that petition be filed within reasonable time after effective date of AEDPA); *Harwell v. Million*, 2003 WL 21801479 (6th Cir. Aug. 4, 2003) (unpublished) ("[w]here a district court dismisses a habeas corpus petition as time-barred, after the respondent has been ordered to file an answer and has so answered without asserting the statute of limitations defense, the district court's dismissal constitutes 'an impermissible curing of the respondent's waiver.'")

For all of these reasons, Lawrence asks this Court to reject Respondent's argument that the Petition is untimely or to permit the Petition by granting equitable tolling. In the lesser alternative, if this Court is disinclined to consider the substantive issues presented in this meritorious petition, Lawrence requests a certificate of appealability on the issue the Petition's timeliness.

WHEREFORE, Mr. Lawrence prays that the Writ issue.

Respectfully submitted,

MARY CATHERINE BONNER, ESQ.
Counsel for Mr. Lawrence
207 S.W. 12th Court
Ft. Lauderdale, Florida 33315-1522
Fl. Bar Number 283398
Tel: (954) 523-6225
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By:_____/s/_____
MARY CATHERINE BONNER, ESQ.

CERTIFICATE OF SERVICE

I HERFBY CERTIFY that a true and correct copy of the foregoing has been mailed, postage prepaid, this 30th day of March, 2004 to Assistant Attorney General Cassandra K. Dolgin, Office of the State Attorney, State of Florida, The Capital, Tallahassee, Florida 32399-1050.

By: /s/ _____
MARY CATHERINE BONNER, ESQ.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NO. 3:03cv97-RH

GARY LAWRENCE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ORDER STAYING PROCEEDINGS

Petitioner was convicted of murder in Florida state court and sentenced to death. He seeks relief in this court by petition for writ of habeas corpus under 28 U.S.C. §2254. Respondent asserts the petition is barred by the one-year statute of limitations. *See* 28 U.S.C. §2244(d)(1). Whether that is so depends upon whether the one-year limitations period was tolled during the pendency of Petitioner's petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of his motion for state collateral review. *See* 28 U.S.C. §2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward any period of limitation under this subsection.").

Petitioner asserts the petition should be deemed timely in accordance with the Sixth Circuit's decision in *Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003) (en banc), *pet. for cert. filed sub nom. Caruso v. Abela*, 72 U.S.L.W. 3506 (Jan. 20, 2004) (No. 03-1079). Petitioner acknowledges, however, that the law in the Eleventh Circuit is to the contrary. *See Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000); *accord Steed*

v. Head, 219 F.3d 1298, 1300 (11th Cir. 2000). Petitioner also invokes the doctrine of equitable tolling, but he plainly has not met the prerequisites to equitable tolling. *See, e.g., Diaz v. Sec'y for Dep't of Corr.*, ___ F.3d ___, 2004 WL 434631 (11th Cir. March 10, 2004) (reviewing case law and remarking that "extraordinary circumstances" are required for equitable tolling); *Steed*, 219 F.3d at 1300 (rejecting argument that "the limitations period is subject to equitable tolling because [Petitioner's] calculation of the statute of limitations depended on an interpretation of a novel legal issue and he was required to interpret Section 2244(d)(2) in the absence of 'clear law' and holding "an attorney's mis-calculation of the limitations period or mistake is not a basis for equitable tolling").

This court of course is bound to follow the law of the Eleventh Circuit. But a petition for writ of certiorari is pending in *Abela*. Consideration of the instant petition will be stayed pending the Supreme Court's ruling in *Abela*. If certiorari is denied or the Sixth Circuit's decision reversed, the instant petition will be dismissed as untimely. But if the Sixth Circuit's decision is affirmed, the instant petition will be considered on the merits.

For these reasons,

IT IS ORDERED:

All proceedings in this matter are stayed pending a final ruling by the United States Supreme Court in *Caruso v. Abela*, 72 U.S.L.W. 3506 (Jan. 20, 2004) (No. 03-1079).

SO ORDERED this 12th day of April, 2004.

/s/ Robert L. Hinkle
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NO. 3:03cv97-RH

GARY LAWRENCE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ORDER ON STATUS OF STAY

Petitioner was convicted of murder in Florida state court and sentenced to death. He seeks relief in this court by petition for writ of habeas corpus under 28 U.S.C. §2254. Respondent asserts the petition is barred by the one-year statute of limitations. *See* 28 U.S.C. §2244(d)(1).

Whether that is so depends upon whether the one-year limitations period was tolled during the pendency of Petitioner's petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of his motion for state collateral review. *See* 28 U.S.C. §2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward any period of limitation under this subsection."). There is a circuit split on this issue. *Compare, e.g., Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000), *with Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003) (en banc), *cert. denied sub nom. Caruso v. Abela*, 72 U.S.L.W. 3506, 2004 WL 193884 (May 24, 2004) (No. 03-1079).

By Order Staying Proceedings entered April 13, 2004 (document 28), this action was stayed pending a final ruling by the United States Supreme Court in *Caruso v. Abela*, 72 U.S.L.W. 3506 (Jan. 20, 2004) (No. 03-1079), which presented this issue. Respondent's motion for reconsideration of the stay order was denied by order entered April 21, 2004. (Document 30.) Respondent filed a notice of appeal, and the appeal remains pending.

The Supreme Court now has denied certiorari in *Abela*. *See Caruso v. Abela*, 72 U.S.L.W. 3506, 2004 WL 193884 (May 24, 2004) (No. 03-1079). The case at bar thus is governed by the law of this circuit as set forth in *Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000); *accord Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000). Under that law, this action is barred by the one-year statute of limitations.[1]

As set forth in the Order Staying Proceedings, this petition will be dismissed in due course. Dismissal will be delayed, however, because of Respondent's notice of appeal. Although it is at least doubtful that the Order Staying Proceedings was an appealable order, Respondent's assertion of a right to an immediate appeal is perhaps not wholly frivolous.[2] But if

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[1] Petitioner also invokes the doctrine of equitable tolling, but, as noted in the Order Staying Proceedings entered April 13, 2004, Petitioner plainly has not met the prerequisites to equitable tolling. *See, e.g., Diaz v. Sec'y for Dep't of Corr.*, 362 F.3d 698, 700-01 (11th Cir. 2004) (reviewing case law and remarking that "extraordinary circumstances" are required for equitable tolling); *Steed*, 219 F.3d at 1300 (rejecting argument that "the limitations period is subject to equitable tolling because [Petitioner's] calculation of the statute of limitations depended on an interpretation of a novel legal issue and he was required to interpret Section 2244(d)(2) in the absence of 'clear law'" and holding "an attorney's miscalculation of the limitations period or mistake is not a basis for equitable tolling").

[2] Even so, why Respondent *wanted* to appeal is a puzzle. Under the Supreme Court's procedures, a decision to grant or deny certiorari in *Abela* was scheduled for this term—that is, by approximately the end of

Respondent's assertion of appellate jurisdiction is not frivolous, this court may lack jurisdiction to act on the issue of whether these proceedings should continue to be stayed, while that very issue is pending on appeal. Accordingly, no order will be entered vacating the stay or dismissing the petition until Respondent's appeal is dismissed or otherwise resolved.

For these reasons,

IT IS ORDERED:

The stay of proceedings entered by order dated April 13, 2004 (document 28) will remain in effect only for so long as Respondent's appeal of that order remains pending. When that appeal is dismissed or otherwise resolved, the stay will immediately be vacated, and judgment will be entered dismissing the petition.

SO ORDERED this 27th day of May, 2004.

/s/ Robert L. Hinkle
United States District Judge

June—and a decision on the merits of any appeal in the Eleventh Circuit could not possibly have been expected by then. If certiorari had been *granted* in *Abela*, a decision on the merits would not have come until next term, but if certiorari had been granted in *Abela*, any assertion that this court could not have stayed proceedings pending the Supreme Court's ruling on the merits would have had *no* chance of success.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NO. 3:03cv97-RH

GARY LAWRENCE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ORDER FOR DISMISSAL

For the reasons set forth in the orders of April 13, 2004 (document 28), April 21, 2004 (document 30), and May 27, 2004 (document 34), and in light of the dismissal of respondent's attempted appeal, denial of the petition as untimely now is appropriate. Accordingly,

IT IS ORDERED:

The clerk shall enter judgment stating, "The petition for writ of habeas corpus is DENIED as untimely." Petitioner's motion for an extension of time (document 38) is DENIED as moot. The clerk shall close the file.

SO ORDERED this 16th day of September, 2004.

/s/ Robert L. Hinkle
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NO. 3:03CV97-rh

GARY LAWRENCE,

Petitioner,

v.

JAMES V. CROSBY,

Respondent.

REQUEST FOR CERTIFICATE OF APPEALABILITY

Mr. Lawrence has been sentenced to death. This Court has denied his Motion to Vacate because of timeliness.

After his conviction and the direct appeal of his sentence of death, a new post conviction counsel was appointed to represent him. His Florida post conviction litigation was conducted by a representative of the Registry of the Commission on Capital Cases through which the Legislature of Florida assured Mr. Lawrence of competent counsel.

Mr. Lawrence believed and was assured that his representation would continue into the federal courts. The Florida Registry statute provided for that continuity. That Registry counsel represented Mr. Lawrence through the Florida collateral process. Florida trial and appellate courts ruled against Mr. Lawrence and the next step in the process would have been a timely filed Motion to Vacate pursuant to Title 28 USC § 2254.

His appointed Registry counsel chose not to proceed before this Court. He then expended effort to attempt to locate a lawyer who would continue with the litigation process. He sought assistance to locate an attorney but was unsuccessful.

Ultimately, Mr. Lawrence filed a *pro se* motion.

Undersigned counsel asked this Court for appointment to represent Mr. Lawrence, with Mr. Lawrence's assent. Before this Court, Mr. Lawrence filed a supplemental Memorandum of Law, through undersigned counsel, which raised issues of substantial Constitutional importance which prejudiced Mr. Lawrence.

The State responded addressing only timeliness. Mr. Lawrence replied thereto and this Court *sua sponte* stayed the matter pending resolution of matters before the United States Supreme Court which would impact on this Court's decision making.

The State asked this Court to reconsider and this Court indicated that, depending on the outcome of certain pending matters, it would rule substantively only after those matters were concluded. The State appealed the Stay Order; Mr. Lawrence moved to strike the appeal. His hope was to address timeliness in depth before this Court. That appeal by the State was ultimately dismissed by the United States Court of Appeals for the Eleventh Circuit.

Before this Court's final ruling, undersigned counsel sought a short continuance in order to review the totality of the matter and if necessary to present facts to this Court. The Order dismissing the petition due to untimely filing and the Order denying the continuance were entered simultaneously.

Mr. Lawrence filed his Notice of Appeal and now asks this Court to grant him a Certificate of Appealability in order that he may litigate both the substantive issues presented, the denial of a hearing thereon and the dismissal for timeliness.

This matter of the gravest concern, it is respectfully submitted, should not be barred because of the failure of an unrepresented, virtually retarded defendant to timely raise issues before this Court.

WHEREFORE, Mr. Lawrence asks that this Court grant him a certificate of appealability.

Respectfully submitted,

MARY CATHERINE BONNER, ESQ.
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Tel: (954) 523-6225
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By: ___ /s/ _____
MARY CATHERINE BONNER, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed, postage prepaid, this 11th day of November, 2004 to Assistant Attorney General Cassandra K. Dolgin, Office of the State Attorney, State of Florida, The Capital, Tallahassee, Florida 32399-1050.

By: ___ /s/ _____

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

Case No. 3:03CV97-rh
CAPITAL CASE

GARY LAWRENCE,

Petitioner,

v.

JAMES V. CROSBY,

Respondent.

SUGGESTIONS IN OPPOSITION TO PETITIONER'S "REQUEST FOR CERTIFICATE OF APPEALABILITY"

Comes now Respondent, by and through counsel, and in opposition to petitioner's "Request For Certificate Of Appealability" (Doc. No. 45) (hereinafter "Request"), states as follows:

1. Background

A. On March 11, 2003, petitioner filed his pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Doc. No. 1. Thereafter, through counsel, petitioner filed an amended petition on September 8, 2003. Doc. No. 12.

B. Respondent filed its "Response To Order To Show Cause Why A Writ Of Habeas Corpus Should Not Be Granted" on January 12, 2004, asserting that petitioner was time-barred pursuant to 28 U.S.C. § 2244(d) from obtaining federal habeas relief. Doc. No. 19.

C. Petitioner, on March 30, 2004, filed his reply to the State's response, opposing the dismissal of his petition. Doc. No. 26

D. Following litigation concerning a stay issued in the case, this Court issued its Order filed September 16, 2004 dismissing the petition as untimely. Doc. No. 39. Judgment was entered on September 20, 2004. Doc. No. 40. The dismissal order relied upon Orders dated April 13, 2004 (Doc. No. 28), April 21, 2004 (Doc. No. 30), and May 27, 2004 (Doc. No. 34). Doc. No. 39, at 1.

E. Petitioner filed his notice of appeal on October 15, 2004, Doc. No. 41, and now seeks a certificate of appealability. Doc. No. 45.

2. Standard

A. A certificate of appealability may issue only "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

B. Under *Barefoot v. Estelle*, 463 U.S. 880 (1983), a substantial showing of a denial of a federal right required "more than the absence of frivolity and that the standard is a higher one than the 'good faith' requirement of § 1915," *id.* at 893, and § 2253(c) "requires an appealing petitioner to demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Henry v. Department of Corrections*, 197 F.3d 1361, 1364 (11th Cir. 1999) (internal quotation marks and citations omitted).

C. "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Tennard v. Dretke*, 124 S.Ct. 2562, 2569 (2004).

D. When the district court denies a habeas petition on procedural

> grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack, 529 U.S. at 484.

3. Discussion

A. Petitioner seeks a certificate of appealability "in order that he may litigate both the substantive issues presented, the denial of a hearing thereon and the dismissal for timeliness." Request, at 3.

B. Because this Court did not address the substantive issues or whether petitioner was entitled to an evidentiary hearing on those claims, a certificate of appealability is inappropriate thereupon for appellate consideration in the first instance. *See Slack*, 529 U.S. at 484 (setting forth the standard for granting a certificate of appealability upon denial of a habeas petition on procedural grounds without disposition of the underlying constitutional claims); *Gonzalez v. Secretary for the Department of Corrections*, 366 F.3d 1253, 1265 (11th Cir. 2004) (discussing *Slack* standard), *pet. for cert. filed* (2004). Petitioner cites no authority and it is generally not the function of the federal appellate court to sit as a trial court and consider claims in the first instance—i.e., those not first decided by the district court. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); *see e.g., Johnson v. Florida*, 348 F.3d 1334, 1354 (11th Cir. 2003); *Torres v. Pittston Co.*, 346 F.3d 1324, 1334 (11th Cir. 2003); *Jackson v. Dugger*, 931 F.2d 712 (11th

Cir.), *cert. denied*, 502 U.S. 973 (1991); *Sofarelli v. Pinellas County*, 931 F.2d 718, 724 (11th Cir. 1991); *see also Drew v. Department of Corrections*, 297 F.3d 1278 (11th Cir. 2002) (reviewing timeliness issue under 28 U.S.C. § 2244(d) only); *Steed v. Head*, 219 F.3d 1298 (11th Cir. 2000) (same).

C. In respect to his request for a certificate of appealability as to the timeliness issue, petitioner reasserts factors that he relied upon in opposing Respondent's motion that the petition be dismissed as untimely filed. *Compare* Request, at 2 *with* "Petitioner's Motion in Opposition to the State's Order-to-show-cause Response And Motion for Equitable Tolling" (Doc. No. 26, at 9-11).

D. First, any actions on the part of counsel is not a basis for equitable tolling. *Helton v. Secretary for the Dept. of Corrections*, 259 F.3d 1310, 1313 (11th Cir. 2001), *cert. denied*, 535 U.S. 1080 (2002); *Sandvik v. United States*, 177 F.3d 1269, 1271-1272 (11th Cir. 1999); *see also* 28 U.S.C. § 2254(i). Petitioner makes no attempt to demonstrate that reasonable jurists would find it debatable that this Court's assessment of the procedural issue was wrong.

E. In seeking a certificate of appealability petitioner also seems to rely upon his assertion that he is "virtually retarded." Request, at 3. Notwithstanding, petitioner ignores the fact that he was quite capable of and did in fact file a habeas petition, albeit untimely. That counsel representing petitioner in state court either did not file the petition or failed to advise petitioner of when it was due is insufficient to establish equitable tolling, as discussed *supra*. Petitioner has failed to meet his burden in respect to the requisite standard under 28 U.S.C. § 2253(c)(2).

F. Finally, the fact that this is a capital case does not call for a different standard for evaluating the application of 28 U.S.C. §2244(d). *See Kreutzer v. Bowersox*, 231 F.3d 460 (8th Cir. 2000). Once again, petitioner makes no attempt

to demonstrate that reasonable jurists would find it debatable that this Court's assessment of the procedural issue was wrong.

4. Conclusion

Having failed to meet the requisite standard under 28 U.S.C. § 2253(c)(2), petitioner is not entitled to a certificate of appealability.

WHEREFORE, for the reasons herein stated, Respondent prays this Court for its order denying petitioner's request for a certificate of appealability.

Respectfully submitted,

CHARLES J. CRIST, JR.
Attorney General

/s/ Cassandra K. Dolgin
CASSANDRA K. DOLGIN
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Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed, postage prepaid, this 12th day of November, 2004, to:

Mary Catherine Bonner, Esq.
207 S.W. 12th Court
Ft. Lauderdale, FL 33315-1522

/s/ Cassandra K. Dolgin
CASSANDRA K DOLGIN

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NO. 3:03cv97-RH

GARY LAWRENCE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ORDER GRANTING CERTIFICATE
OF APPEALABILITY

Final judgment has been entered denying this petition for writ of habeas corpus under 28 U.S.C. §2254. Petitioner has filed a timely notice of appeal. Under 28 U.S.C. §2253(c)(1), however, petitioner may not appeal unless a certificate of appealability is issued. Under *Edwards v. United States*, 114 F.3d 1083 (11th Cir. 1997), petitioner's notice of appeal is deemed an application for a certificate of appealability. Petitioner also has filed separate motions for a certificate of appealability, for appointment of counsel for appeal, and for leave to proceed on appeal in forma pauperis. Respondent has filed a memorandum in opposition.

A certificate of appealability may be issued only if petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). *See Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 1039-40, 154 L. Ed. 2d 931 (2003) (explaining meaning of this term); *Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (same); *Barefoot v. Estelle*, 463 U.S. 880,

893 n.4, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983); *see also Williams v. Taylor*, 529 U.S. 362, 402-13, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (setting forth standards applicable to §2254 petitions on the merits). As the Court said in *Slack*:

> To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "'adequate to deserve encouragement to proceed further.'"

Slack, 529 U.S. at 483-84, *quoting Barefoot*, 463 U.S. at 893 n.4. Further, in order to obtain a certificate of appealability when dismissal is based on procedural grounds, a petitioner must show, "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

In the case at bar, the petition was denied as untimely. The dispositive issue is whether the one-year limitations period applicable to a petition for writ of habeas corpus under 28 U.S.C. §2254 is tolled during the pendency of a petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of petitioner's earlier motion for state collateral review. *See* 28 U.S.C. §2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward any period of limitation under this subsection."). There is a circuit split on this issue. *Compare, e.g., Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000), *and Steed v. Head, 219 F.3d 1298*, 1300 (11th Cir. 2000), *with Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003) (en banc),

cert. denied sub nom. Caruso v. Abela, 72 U.S.L.W. 3506, 2004 WL 193884 (May 24, 2004) (No. 03-1079).

Jurists of reason could not debate whether this issue is settled at the panel level in the Eleventh Circuit; under *Coates* and *Steed*, the issue is settled. But jurists of reason could find it debatable whether the Eleventh Circuit view, as set forth in *Coates* and *Steed*, or the Sixth Circuit view, as set forth in *Abela*, ultimately is correct. A certificate of appealability properly should be issued so that petitioner can pursue the possibility of en banc or Supreme Court review of this issue. Petitioner also asserts equitable tolling, an issue that appropriately may be addressed in conjunction with the legal issue that is the subject of the circuit split.

For the same reasons, I find that petitioner's appeal is taken in good faith, and that he therefore should be allowed to proceed in forma pauperis on appeal.

Accordingly,

IT IS ORDERED:

1. Petitioner's notice of appeal (document 10), treated as an application for a certificate of appealability, and petitioner's motion for issuance of a certificate of appealability (document 45), are GRANTED.

2. A certificate of appealability is hereby issued on the question whether the one-year limitations period applicable to a petition for writ of habeas corpus under 28 U.S.C. §2254 barred this petition, and on the legal issue whether the statute of limitations is tolled during the pendency of a petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of petitioner's earlier motion for state collateral review. *See* 28 U.S.C. §2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward any period of limitation under this

subsection."); *compare, e.g., Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000), *and Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000), *with Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003) (en banc), *cert. denied sub nom. Caruso v. Abela*, 72 U.S.L.W. 3506, 2004 WL 193884 (May 24, 2004) (No. 03-1079).

3. Petitioner's motion for appointment of counsel (document 46) is GRANTED. The appointment of Mary Catherine Bonner as attorney for petitioner is continued for purposes of appeal.

4. Petitioner's motion for leave to proceed on appeal in forma pauperis (document 47) is GRANTED.

SO ORDERED this 15th day of November, 2004.

/s/ Robert L. Hinkle
Chief United States District Judge

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 04-15435

GARY LAWRENCE,
Petitioner-Appellant,

v.

STATE OF FLORIDA,
Respondent-Appellee.

Aug. 26, 2005

Appeal from the United States District Court
for the Northern District of Florida

Before DUBINA, BLACK and CARNES, *Circuit Judges.*

DUBINA, *Circuit Judge*:

This is a death penalty case in which the Certificate of Appealability ("COA") presents only one issue for our review: whether the one-year limitations period of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d)(1), bars petitioner Gary Lawrence's habeas petition. After reviewing the record, reading the parties' briefs, and having the benefit of oral argument, we agree with the district court that Lawrence's petition was untimely. Accordingly, we affirm the district court's order.

BACKGROUND

In March 1995, a Florida jury convicted Lawrence of one count each of premeditated murder in the first degree, conspiracy to commit murder, petit theft, and grand theft of a

motor vehicle. The jury recommended a death sentence based on the murder conviction, and the trial court followed the jury's recommendation and imposed a death sentence. The Florida Supreme Court summarized the facts of the murder as follows:

> Shortly after Gary and Brenda Lawrence were married, they separated, and another man, Michael Finken, moved in with Brenda and her two daughters, Stephanie and Kimberly Pitts, and Stephanie's friend, Rachel Matin. On the day of the murder, July 28, 1994, Gary and Michael drove Brenda to work and then drank beer at a friend's house. Later, Gary and Michael picked Brenda up and the three returned to the friend's house where they drank more beer. After the three returned to Brenda's apartment, Gary and Michael argued and Gary hit Michael when he learned that Michael had been sleeping with Brenda. Gary and Michael seemed to resolve their differences, and Michael fell asleep on the couch. Gary and Brenda conversed, and Brenda went through the house collecting weapons—including a pipe and a baseball bat. Gary and Brenda told Kimberly and Rachel that they were "going to knock off Mike." Gary told Kimberly to "stay in your bedroom no matter what you hear."

The trial court described what happened after Gary and Brenda spoke to the girls:

> Thereafter, the two girls heard what they described as a pounding sound. At one point, Rachel Matin stated that she heard the victim say, "stop it, if you stop, I'll leave." She stated that she heard that statement several times. Kimberly Pitts stated she heard the victim say, "please don't hit me, I'm already bleeding." The victim's pleas, however, were met with more pounding. Once the pounding stopped, the girls were required to assist in the clean up and described to the jury what they observed.

Kimberly stated that much of the victim's right side of his face was missing and his chin was knocked over to his ear. Rachel Matin stated that there was no skin left on the victim's face and part of his nose was missing. Apparently the victim was still alive. Kimberly observed her mother coming out of the kitchen area with what appeared to be a dagger and then, although not seeing the dagger in her hand at the time, observed her mother make a stabbing motion toward the victim with something in her hand.

It was at that time when Brenda Lawrence requested that the girls obtain the assistance of Chris Wetherbee. Upon his entrance into the home, Chris Wetherbee observed the victim's head being caved in, blood all over, the victim's eyeball protruding approximately three inches and a mop handle shoved into the victim's throat. Wetherbee asked Gary Lawrence, "what's going on?" At which time the Defendant responded by pulling out the mop handle and kicking the victim and making the statement "this is what's going on." Immediately after removing the mop handle from the victim's throat, Wetherbee heard the victim give approximately three or four ragged breaths at which time the victim thereafter stopped breathing and apparently expired. The Defendant, Gary Lawrence, told Wetherbee that he had beat him with a pipe until it bent and then beat him with a baseball bat.

Chris Wetherbee summarized the victim's state: "And [he] looked like something off of one of the real good horror movies." Gary and Brenda then removed a small amount of money from Michael's pockets, wrapped the body in a shower curtain and placed the body in Michael's car, and Gary drove to a secluded area where

> he set the body afire. When Gary returned home, he and Brenda danced.

Lawrence v. State, 698 So.2d 1219, 1220 (Fla.1997).

The Florida Supreme Court affirmed Lawrence's conviction and sentence. *Id.* The United States Supreme Court denied certiorari review on January 20, 1998. *Lawrence v. Florida*, 522 U.S. 1080, 118 S.Ct. 863, 139 L.Ed.2d 761 (1998). Lawrence sought state post-conviction relief, and the trial court denied the petition on October 11, 2000. The Florida Supreme Court affirmed the trial court's denial of state post-conviction relief. *Lawrence v. State*, 831 So.2d 121 (Fla.2002). The United States Supreme Court denied certiorari review of the Florida Supreme Court's denial of post-conviction relief. *Lawrence v. Florida*, 538 U.S. 926, 123 S.Ct. 1575, 155 L.Ed.2d 319 (2003).

Lawrence then moved to federal court seeking habeas relief pursuant to 28 U.S.C. § 2254. The filing of his March 11, 2003, federal pro se petition sparked an unusual procedural journey. After filing an amended habeas petition, the State responded that the district court should dismiss the petition because Lawrence was time-barred from obtaining federal habeas relief on either the original petition or the amended petition. The State also argued that equitable tolling should not apply in Lawrence's case. Lawrence opposed the dismissal on the basis that there was a disagreement among the courts of appeal on the question whether a petition for certiorari to the U.S. Supreme Court following the denial of state post-conviction relief tolls the limitation period. Lawrence sought to invoke the doctrine of equitable tolling on the grounds that it was appropriate because (1) counsel who advised him of the timing of his petition was selected by and pre-qualified by the State of Florida under its registry statute; (2) his mental abilities prevented him from meaningfully participating in a relationship with his counsel; and (3) he had a facially strong constitutional claim.

On April 12, 2004, the district court entered an order staying the proceedings. The court determined that whether Lawrence's petition was time-barred "depends upon whether the one-year limitations period was tolled during the pendency of Petitioner's petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of his motion for state collateral review." [Dist. Ct. Order 28 at 1-2]. The court noted that there was a circuit split on the issue, although Eleventh Circuit precedent clearly stated that the limitations period was not tolled during the pendency of a petition for certiorari challenging the state court's denial of post-conviction relief. *See Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir.2000). On the question of equitable tolling, the district court found that Lawrence had not met the prerequisites to equitable tolling. However, in light of the pending certiorari petition in *Abela v. Martin*, 348 F.3d 164 (6th Cir.2003), *cert. denied sub nom*, *Caruso v. Abela*, 541 U.S. 1070, 124 S.Ct. 2388, 158 L.Ed.2d 976 (2004), which held contrary to this circuit's decision in *Coates*, 211 F.3d at 1227, the district court entered an order staying the proceedings. The district court noted that if the Supreme Court denied review in *Abela*, then it would dismiss Lawrence's petition based on *Coates*. [Dist. Ct. Order 28 at 1-2].

Subsequently, on May 27, 2004, after the Supreme Court denied review in *Caruso v. Abela*, the district court noted in an order that Lawrence's petition was time-barred based on *Coates*. [Dist. Ct. Order 34 at 2]. However, the court did not enter an order dismissing the petition because the State had lodged an appeal from the district court's stay order. After this court dismissed the State's appeal from the stay order for lack of jurisdiction, the district court entered the order dismissing the petition. Lawrence filed a motion for a COA, which the district court granted. The district court set forth the issue in the COA as "whether the one-year limitations period applicable to a petition for writ of habeas corpus under

28 U.S.C. § 2254 barred this petition, and on the legal issue whether the statute of limitations is tolled during the pendency of a petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of petitioner's earlier motion for state collateral review." [Dist. Ct. Order 45, at 4].

DISCUSSION

The only issue presented in the COA is whether the one-year limitations period under AEDPA bars Lawrence's habeas petition. After needless delay, the district court determined that Lawrence's petition was untimely.[1] "The district court's interpretation and application of a statute of limitations is a question of law that is subject to de novo review." *Hepburn v. Moore*, 215 F.3d 1208, 1209 (11th Cir.2000). We also review de novo the district court's legal decision on equitable tolling. *Drew v. Dep't of Corr.*, 297 F.3d 1278, 1283 (11th Cir.2002); *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir.2000). However, we will reverse the district court's factual determinations only if they are clearly erroneous. *Drew*, 297 F.3d at 1283. The district court's finding whether a party was diligent in ascertaining the federal habeas filing deadline is a finding of fact. *See id.* at 1287, 1287 n. 2 (stating that "[t]reating a finding regarding diligence as a finding of fact is consistent with the approach taken by the majority of the circuits in both habeas corpus proceedings and other contexts").

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[1] We say needless delay because we conclude that the district court abused its discretion in entering a stay order pending a certiorari ruling by the United States Supreme Court in *Caruso v. Abela*, 541 U.S. 1070, 124 S.Ct. 2388, 158 L.Ed.2d 976 (2004). The stay injured the State because the State has a substantial interest in the finality of state criminal proceedings. *See McCleskey v. Zant*, 499 U.S. 467, 493, 111 S.Ct. 1454, 1470, 113 L.Ed.2d 517 (1991). "Each delay, for its span, is a commutation of a death sentence to one of imprisonment." *Thompson v. Wainwright*, 714 F.2d 1495, 1506 (11th Cir.1983).

We begin our discussion by setting forth the limited circumstance under which a court may issue a COA. The right to appeal is governed by the COA requirements set forth in 28 U.S.C. § 2253(c):

> *(c)(1)* Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> *(A)* the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> *(B)* the final order in a proceeding under section 2255.
>
> *(2)* A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> *(3)* The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c).

Under this limited provision, if a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claims, a COA should issue only if the petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S.Ct. 1595, 1601, 146 L.Ed.2d 542 (2000). "[B]oth showings [must] be made before the court of appeals may entertain the appeal." *Id.* at 485, 120 S.Ct. at 1604. If the procedural bar is obvious and the district court correctly invoked it to dispose of the case, "a reasonable jurist could not conclude either that the district court erred in dismissing

the petition or that the petitioner should be allowed to proceed further." *Id.* at 484, 120 S.Ct. at 1604. The court may first resolve the issue whose answer is more apparent from the record and the arguments. *Id.* at 485, 120 S.Ct. at 1604. "The recognition that the court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of, allows and encourages the court to first resolve procedural issues." *Id.* (quotations and citation omitted).

Because of the statutory constraint in issuing a COA, we are puzzled by the district court's issuance of a COA in this case. The district court should not have issued a COA on the statute of limitations issue because binding circuit precedent clearly disposed of the issue. "[T]he time during which a petition for writ of certiorari is pending, or could have been filed, following the denial of collateral relief in the state courts, is not to be subtracted from the running of time for 28 U.S.C. § 2244(d)(1) statute of limitations purposes." *Coates*, 211 F.3d at 1227. On that basis, jurists of reason would not find the timeliness issue debatable in this circuit. Thus, a COA should not have issued.

However, the district court did issue a COA on the statute of limitations issue. Although the COA does not specifically state that the exceptions to the statute of limitations—State impediment and equitable tolling—are included within the COA, Lawrence contends that these exceptions are subsumed within the COA and properly before this court for consideration. We agree. To decide whether the statute of limitations bars Lawrence's federal habeas petition, we must consider whether a State impediment or equitable tolling excepts the one-year filing deadline. If Lawrence can demonstrate that a State impediment prevented him from timely filing or that equitable tolling applies to his case, then his petition is timely.

Lawrence contends that 28 U.S.C. § 2244(d)(1)(B)[2] applies to his case because the State caused an impediment to his timely filing by providing him with an incompetent attorney through the Florida counsel registry system. It is not clear, however, that Lawrence asserted a § 2244(d)(1)(B) impediment to the district court. We generally do not consider an issue that was not raised in the district court. *Calsadilla v. Banco Latino Int'l*, 413 F.3d 1285, 1287 (11th Cir.2005); *Rhine v. Boone*, 182 F.3d 1153, 1154 (10th Cir.1999) (refusing to consider § 2244(d)(1)(B) argument because petitioner did not argue in district court that State had created an impediment to his filing in violation of the Constitution). Assuming Lawrence presented this issue to the district court, we conclude that Lawrence's assertion that the State impeded him from timely filing by providing an incompetent attorney to assist him after setting up a State registry system to monitor attorney performance, is meritless. This is not the type of State impediment envisioned in § 2244(d)(1)(B).

Additionally, Lawrence cannot show that there are extraordinary circumstances present in his case to warrant the application of equitable tolling. "Equitable tolling is an extraordinary remedy which is typically applied sparingly." *Steed*, 219 F.3d at 1300. It is available "when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir.1999). Equitable tolling is limited to rare and exceptional circumstances, such as when the State's conduct prevents the petitioner from timely filing. *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir.2000); *see also Irwin v. Dep't of Veterans*

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[2] This provision states that the one-year limitation period shall begin to run on "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action." 28 U.S.C. § 2244(d)(1)(B).

Affairs, 498 U.S. 89, 96, 111 S.Ct. 453, 458, 112 L.Ed.2d 435 (1990) (stating that the Court has allowed equitable tolling in situations where complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass); *Arce v. Garcia*, 400 F.3d 1340, 1349 (11th Cir.2005) (noting that in order to invoke equitable tolling, courts usually require some affirmative misconduct, such as deliberate concealment).

Making the most of a novel argument, Lawrence posits that the State's provision to him of an incompetent attorney justifies the imposition of equitable tolling. This is not an extraordinary circumstance that warrants the application of equitable tolling. Moreover, we have stated on numerous occasions that "attorney negligence is not a basis for equitable tolling, especially when the petitioner cannot establish his own diligence in ascertaining the federal habeas filing deadline." *Howell v. Crosby*, 415 F.3d 1250, 1250 (11th Cir.2005); *accord Helton v. Secretary for the Dep't of Corr.*, 259 F.3d 1310, 1313 (11th Cir.2001); *Steed*, 219 F.3d at 1300; *Sandvik*, 177 F.3d at 1270.

Lawrence also contends that his mental incapacity prevented him from timely filing and justifies the invocation of equitable tolling. However, Lawrence cannot establish a causal connection between his alleged mental incapacity and his ability to file a timely petition. Lawrence admits in his appellate brief that medical reports state that his full scale IQ is 81, and he admits that he did not make the assertion that he was mentally incompetent per se. Instead, Lawrence claims that his initial pleading made it clear that he has suffered from mental impairments his entire life. However, this contention, without more, is insufficient to justify equitable tolling. *See Bilbrey v. Douglas*, 124 Fed.Appx. 971, 973 (6th Cir.2005) (finding that equitable tolling did not apply because petitioner "failed to establish a causal connection between her mental condition and her ability to file a timely petition"); *Green v.*

Hinsley, 116 Fed.Appx. 749, 751 (7th Cir.2004) (finding that equitable tolling did not apply because petitioner failed to submit evidence of how his low IQ would render him incompetent or prevent him from timely filing his petition); *Fisher v. Gibson*, 262 F.3d 1135, 1145 (10th Cir.2001) (finding that petitioner's mere allegations of incompetency at the time of his guilty pleas did not suffice to warrant equitable tolling of the limitations period); *Collins v. Scurr*, 230 F.3d 1362 (8th Cir.2000) (Table) (finding that bald and unsupported assertions that relate to an instance of alleged mental incompetency that occurred at a time remote to petitioner's habeas petition filing deadline did not equitably toll the statute of limitations); *Fisher v. Johnson*, 174 F.3d 710, 716 (5th Cir.1999) (finding that equitable tolling did not apply when petitioner's brief period of incapacity "occurred at a time so remote to his deadline" and petitioner could not show that he diligently pursued his application the remainder of the one-year filing deadline); *cf. Laws v. Lamarque*, 351 F.3d 919, 923 (9th Cir.2003) (remanding case for further factual development on issue of whether petitioner's mental illness prevented him from timely filing his federal habeas petition as to warrant the application of equitable tolling); *Nara v. Frank*, 264 F.3d 310, 320 (3d Cir.2001) (remanding case for further factual development where petitioner "presented evidence of ongoing, if not consecutive, periods of mental incompetency" because mental incompetence may constitute an extraordinary circumstance for purposes of tolling the statute of limitations when a person's mental deficiency affects his ability to file a timely habeas petition).

CONCLUSION

For the above stated reasons, we affirm the district court's order dismissing Lawrence's habeas petition as untimely.

AFFIRMED.

FILED
JUN 26 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 05-8820

IN THE

Supreme Court of the United States

GARY LAWRENCE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE PETITIONER

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June 26, 2006

QUESTIONS PRESENTED

I. There is a split in the circuits about whether the one-year period of limitations is tolled for "[t]he time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment of claim is pending . . . ." Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244(d)(2). Where a defendant facing death has pending a United States Supreme Court certiorari petition to review the validity of the state's denial of his claims for state post-conviction relief, does the defendant have an application pending which tolls the 2244(d)(2) statute of limitations?

II. Alternatively, does the confusion around the statute of limitations – as evidenced by the split in the circuits – constitute an "extraordinary circumstance," entitling the diligent defendant to equitable tolling during the time when his claim is being considered by the United States Supreme Court on certiorari?

III. And in the second alternative, do the special circumstances where counsel advising the defendant as to the statute of limitations was registry counsel – a species of state actor – under the monitoring supervision of Florida Courts, with a statutory duty to file appropriate motions in a timely manner, constitute an "extraordinary circumstance" beyond the defendant's control such that the doctrine of equitable tolling should operate to save his petition?

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The opinion of the Court of Appeals for the Eleventh Circuit (J.A. __) is reported at 421 F.3d 1221 (11th Cir. 2005).

JURISDICTION

Judgment by the Court of Appeals for the Eleventh Circuit was issued on August 26, 2005. Petitioner timely filed a Petition for a Writ of Certiorari on January 23, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Antiterrorism and Effective Death Penalty Act ("AEDPA") (28 U.S.C. § 2244(d)) provides in relevant part:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; . . . .
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

At issue in this case are the provisions of the AEDPA that govern the one-year limitations period for filing federal habeas petitions. The Eleventh Circuit refused to toll petitioner's limitations period pending review of a petition for

a writ of certiorari to this Court following state court denial of post-conviction relief and affirmed the Northern District of Florida's dismissal of his claim for federal habeas relief as untimely. The effect of this ruling deprives the petitioner of a federal forum for his constitutional claims. Moreover, this reading of the statute is at odds with its plain language and statutory structure and leads to absurd and inequitable results. Accordingly, this Court should vacate the judgment below and remand for consideration of petitioner's underlying claim for federal habeas corpus relief.

A. Trial Proceedings.

In March 1995, a Florida jury convicted Mr. Lawrence of premeditated murder in the first degree and conspiracy to commit murder.[1] Mr. Lawrence was found guilty, along with his wife, Brenda Lawrence, of brutally beating to death his wife's lover, Michael Finken. *Lawrence* v. *State*, 698 So. 2d 1219, 1220 (Fla. 1997). The prosecutor's evidence showed that during a drinking binge in which all three individuals participated, Mr. Lawrence's wife revealed to him that she had been sexually involved with Mr. Finken.[2] Prosecutors argued that in a state of drunken anger, and with his wife's participation, Mr. Lawrence attacked and killed Mr. Finken. Following the jury's recommendation, the trial court sentenced Mr. Lawrence to death.[3] Notwithstanding evidence that Brenda Lawrence was the moving force behind the attack on the victim, may have obtained the murder weapons, struck

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[1] (J.A. ___) *Lawrence* v. *Florida*, 421 F.3d 1221, 1222 (11th Cir. 2005).

[2] 5 Tr. of R. at 266, *State* v. *Lawrence*, No. 85,725 (Fla. June 20, 1995); 6 Tr. of R. at 340, *State* v. *Lawrence*, No. 85,725 (Fla. June 20, 1995).

[3] (J.A. ___) *Lawrence*, 421 F.3d at 1222.

blows, and celebrated after the killing,[4] she received a life sentence.[5]

Florida has a bifurcated capital procedure with a trial to establish each element of the crimes charged followed by a separate penalty-phase proceeding. At trial in this case, there was extensive testimony about Mr. Lawrence's drunkenness. But the defense did not present a single expert at trial to testify regarding impact of this extreme intoxication on Mr. Lawrence's ability to formulate intent. Nor was evidence produced on the issue of Mr. Lawrence's life-long use of intoxicants and drugs. Also absent was any testimony about Mr. Lawrence's very low IQ. Experts before the jury discussed none of these issues until the sentencing phase of the trial. There, questions of alcohol abuse, mental illness and mental retardation were introduced through the testimony of Drs. James Larson and Glenn Galloway, who explained that Mr. Lawrence's 81 IQ places him near the level of legal incompetence and correlates with an inability to process ideas, to plan, to understand, to appreciate relationships, and to understand what goes on in daily life.[6] Trial counsel, however, did not instruct either expert to investigate or testify regarding the serious potential for organic brain disorders given Mr. Lawrence's history. New counsel for Mr. Lawrence in the state post-conviction process did present such evidence and argued that a failure to investigate such obvious leads rendered trial counsel's assistance ineffective.

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[4] (J.A. ___) 421 F.3d at 1222-23.

[5] *Lawrence*, 698 So. 2d at 1221.

[6] *See* Penalty Phase Tr. at 78-79, *State* v. *Lawrence*, No. 94-397-CFA (Santa Rosa County, Fla. Cir. Ct. Mar. 17, 1995) ("Penalty Phase Tr.") (test. of Dr. Glenn Galloway).

B. Direct Appeal.

Mr. Lawrence appealed his conviction and sentence.[7] On August 28, 1997, the Supreme Court of Florida affirmed[8] and his conviction became final on January 20, 1998.[9] On that date, the state's one-year statute of limitations for post-conviction proceedings began to run. Fla. R. Crim. P. 3.851.

Pursuant to 28 U.S.C. § 2244(d)(1)(A), AEDPA's one-year limitations period also began to run on January 20, 1998 at the "conclusion of direct review," including the time for filing a petition for certiorari or the time necessary for such a petition to be resolved. 28 U.S.C. § 2244(d)(1)(A); *Clay* v. *United States*, 537 U.S. 522, 527 (2003). AEDPA's limitations period was thereafter tolled by Mr. Lawrence's filing of a petition for state post-conviction relief pursuant to Fla. R. Crim. P. 3.850. 28 U.S.C. § 2244(d)(2). That motion was not filed until January 19, 1999, 364 days after direct review was finalized, tolling the AEDPA's one-year limitations period with just one day remaining. As explained below, this delay was entirely attributable to extensive changes in Florida's post-conviction appointment and representation process.

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[7] On appeal, Mr. Lawrence raised the following claims: (1) his death sentence was disproportionate to other death penalty cases; (2) the murder was not committed in a cold, calculated, and premeditated manner; (3) the murder was not heinous, atrocious, or cruel; and (4) the trial court erred in failing to find statutory mitigating circumstances and in rejecting the disparate treatment of his co-defendant Brenda Lawrence as a mitigating circumstance. *See Lawrence*, 698 So. 2d at 1221-22.

[8] *See Lawrence*, 698 So. 2d 1219. The court issued a mandate on October 2, 1997. Fla. Comm'n on Capital Cases, *Inmate Legal Status Report re: Gary Lawrence*, *available at* http://www.floridacapitalcases.state.fl.us).

[9] *Lawrence* v. *Florida*, 522 U.S. 1080 (1998).

C. Delay In Appointing Post-Conviction Counsel.

Mr. Lawrence had 365 days from January 20, 1998, the date his state conviction became final, to file for state post-conviction relief and federal habeas relief. He was, of course, required to exhaust state remedies in the form of state post-conviction proceedings before filing a petition for federal habeas corpus. Complying with this requirement took 364 days.

In order to understand why 364 days passed before Mr. Lawrence's state post-conviction application was filed, one must look at the dire circumstances in Florida during the relevant time frame. Florida instituted major reforms of the state's post-conviction review process in capital cases in 1993. This was an attempt to repair a dysfunctional system in which cases languished in post-conviction proceedings for many years and court-appointed attorneys were unable "to properly represent all death penalty inmates in post-conviction relief cases." See Fla. R. Crim. P. 3.851 cmt. (1993). In order to expedite the review process, the statute of limitations for filing for a state post-conviction application was reduced from two years to one year. However, when the Supreme Court of Florida adopted these procedural changes, it specifically noted that reducing the limitations period for seeking collateral relief in capital cases could only be justified if counsel were immediately available to capital defendants.[10] Notwithstanding the Supreme Court of Florida's directive that counsel should be appointed within thirty days, the 1993 rule did not expressly require appointment of counsel within that time frame. As this case exemplifies, the thirty-day

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[10] *See* Fla. R. Crim. P. 3.851 cmt. (1993) (stating that "counsel should be designated . . . not later than 30 days after the defendant's judgment and sentence of death becomes final. . . . In the event the capital collateral representative is not fully funded and available to provide proper representation . . the reduction in the time period would not be justified and would necessarily have to be repealed").

appointment window was not always honored in practice; yet the two-year limitations period was never restored.

These perilous circumstances continued for more than five years, and they were on-going when Mr. Lawrence's capital conviction became final on January 20, 1998. Subsequently, on July 1, 1998 (at which time Mr. Lawrence had been without counsel for over five months and remained so) the state legislature amended Rule 3.851 to require appointment of post-conviction counsel in all capital cases within ninety-one days.[11]

Although Florida law provides that death-penalty defendants will be appointed post-conviction counsel and that such counsel will be appointed promptly, this did not happen here. Mr. Lawrence was not appointed counsel within the Supreme Court of Florida's strongly suggested thirty-day time-frame, or even within the Florida legislature's mandated ninety-one day time-frame. Instead, Florida first appointed counsel for Mr. Lawrence on August 10, 1998, 202 days after the state and AEDPA limitations periods began to run.[12]

Each day that the Florida system delayed this appointment deprived Mr. Lawrence of a day available to meet two 365-day filing deadlines, one for state post-conviction relief and the other for a federal habeas petition. Yet this initial appointment of counsel did not cure the State's long delay, as Mr. Lawrence's first attorney promptly petitioned the court to withdraw because of a conflict and was permitted to withdraw

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[11] *See* S. 1328, 15th Leg., 2d Sess. (Fla. 1998); *see also Amendments to Florida Rules of Criminal Procedure - Capital Postconviction Public Records Production (Time Tolling)*, 719 So. 2d 869, 870 (Fla. 1998) ("private counsel is to be appointed by the trial court in any capital case in which ninety-one days have elapsed since this Court issued its mandate or, where a petition for certiorari was filed with the United States Supreme Court, ninety-one days have elapsed since the petition was denied").

[12] *See* Order Appointing Counsel, No. 94-397-CFA (Santa Rosa County, Fla. Cir. Ct. Aug. 10, 1998)).

on August 31, 1998.[13] At that point, there were 142 days left of the original 365.

The court appointed a second post-conviction attorney for Mr. Lawrence.[14] The court, the State, and the second attorney spent sixty-six days, from August 31, 1998 to November 5, 1998 discussing the suitability of the appointment contract, the burden of the attorney's caseload, and other matters unrelated to the issues in this case. After two months of these discussions, the court entered an order allowing that attorney to withdraw.[15] There were sixty-seven days left of the 365-day limitations period.

It was not until November 5, 1998, a full 298 days after his certiorari petition was denied, that Mr. Lawrence was appointed counsel who took an active role in his case.[16] At this point, counsel had only two months left in which to assemble and become familiar with the record, conduct further investigation, research legal questions, and file an initial application for state post-conviction review in order to toll the clock that was running against Mr. Lawrence's federal habeas motion.

After counsel was appointed on November 5, he promptly requested the record below. The Florida records custodian provided post-conviction counsel with those records on December 14, with only thirty-seven days left of the original

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[13] *See* Pet. to Withdraw as Appointed Counsel, No. 94-397-CFA (Santa Rosa County, Fla. Cir. Ct. filed Aug. 31, 1998).

[14] *See* Order Appointing Counsel, No. 94-397-CFA (Santa Rosa County, Fla. Cir. Ct. Aug. 31, 1998).

[15] *See* Order Allowing Attorney to Withdraw, No. 94-397-CFA (Santa Rosa County, Fla. Cir. Ct. Nov. 5, 1998).

[16] *See* Amended Order Appointing Counsel, No. 94-397-CFA (Santa Rosa County, Fla. Cir. Ct. Nov. 5, 1998).

365.[17] Counsel then asked and was allowed to hire an investigator on December 17.[18] There were thirty-three days left. Assessing the need for additional records, counsel filed a supplemental records request. On January 4, 1999, counsel filed an unsuccessful motion for an extension of time and tolling of the clock while he waited for state agencies to produce or contest the production of supplemental records not provided on December 14, 1998.[19] There were sixteen days left. While records production litigation was still on-going, counsel filed the state post-conviction motion on January 19, 1999. Mr. Lawrence had only one day left on the clock to file his federal habeas petition.[20]

In the midst of these delays, the Florida legislature substantially altered the discovery process in post-conviction proceedings. See *Amendments to Florida Rules of Criminal Procedure - Capital Postconviction Public Records Production (Time Tolling)*, 719 So. 2d 869, 870 (Fla. 1998). The legislature directed that the Secretary of State establish a repository for archiving capital post-conviction public records in order to better facilitate the timely exchange of documents. *See* S. 1330, 15th Leg., 2d Sess. (Fla. 1998). The new discovery system was to be fully implemented by October 1, 1998. As might be expected, however, the transition created considerable turmoil and resulted in significant delays in the

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[17] *See* Mot. to Extend Time for 3.852 Disclosure of Additional Public Records, No. 94-397-CFA (Santa Rosa County, Fla. Cir. Ct. filed Jan. 4, 1999).

[18] *See* Order on Defense Motion for Appointment of Investigator, No. 94-397-CFA (Santa Rosa County, Fla. Cir. Ct. Dec. 17, 1998).

[19] *See* Mot. to Extend Time for 3.852 Disclosure of Additional Public Records, No. 94-397-CFA (Santa Rosa County, Fla. Cir. Ct. filed Jan. 4, 1999).

[20] *See* Case Information/Progress Docket, No. 94-397-CFA (Santa Rosa County, Fla. Cir. Ct.).

post-conviction review process. *Amendments to Florida Rules of Criminal Procedure*, 719 So. 2d at 870-71.

On June 25, 1998, the Supreme Court of Florida issued an opinion acknowledging the chaos in the post-conviction review process and recognizing that the upheaval would have a detrimental impact on Mr. Lawrence's case and that of dozens of other capital defendants. *Id.* The Supreme Court took the extraordinary step of continuing an earlier, temporary tolling order and tolling the statute of limitations for state habeas petitions to October 1, 1998. See *id.* app. B (tolling the state time requirements for all defendants, including Mr. Lawrence, for whom public records had been compiled in the new repositories but for whom counsel had not been provided). The court further ordered appointment of counsel for Mr. Lawrence and others from either the office of Capital Collateral Relief Counsel or the state-established registry of private counsel by October 1, 1998. *Id.* at 871.

Mr. Lawrence did finally receive counsel who took an active role in his case on November 5, 1998. Yet while the state statute of limitations had been tolled for 130 days by the Supreme Court of Florida, that court had no authority to apply the equitable principles that had prompted its tolling of the state statute of limitations to the AEDPA limitations period. Thus, incongruously, the federal statute of limitations continued to run until counsel was finally able to file a 3.850 motion for state post-conviction relief on January 19, 1999 with only one day remaining on Mr. Lawrence's AEDPA clock.

D. Post-Conviction Proceedings.

Mr. Lawrence's motion for post-conviction relief under Fla. R. Crim. P. 3.850 focused on claims that his trial counsel had rendered ineffective assistance. Specifically, Mr. Lawrence contended that trial counsel had failed adequately to investigate mitigating evidence relating to Mr. Lawrence's significant mental impairment, which bordered on mental

retardation and may have been related to fetal alcohol syndrome.[21] Experts who evaluated Mr. Lawrence indicated that his IQ score of 81 and other indicia of severely diminished capacity might have in fact been clinical retardation[22] and therefore a powerful mitigating factor, if not one that constitutionally precluded imposition of the death penalty.[23]

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[21] The application for state post-conviction relief also raised the following issues: (1) lack of sentencing proportionality between codefendants; (2) the improper consideration of evidence in aggravation concerning Mr. Lawrence's previous sentence of imprisonment; (3) the State's noncompliance with public requests for public records; and (4) the State's noncompliance with requests for judicial records. *See* Mot. for Post-Conviction Relief 3.850, *State* v. *Lawrence*, No. 94-397-CF (Santa Rosa County, Fla. Cir. Ct. Jan. 19, 1999). On April 22, 1999, Mr. Lawrence filed an amended motion for post-conviction relief, asserting fourteen claims of ineffective assistance of counsel. Among the ineffective assistance claims, Mr. Lawrence alleged: inadequate presentation of Mr. Lawrence's mental deficiencies and use of intoxicants; failure to object to the State's comments during closing argument that evidence was uncontroverted; no assistance by an additional defense attorney. *See* Am. Mot. for Post-Conviction Relief 3.850, No. 94-397-CF (Santa Rosa County, Fla. Cir. Ct. Apr. 22, 1999); *see also* Letter from Michael Rappaport, Ph.D. to Joe McDermott, Esq. 1-2 (Sept. 20, 1999) (psychological evaluation of Gary Lawrence) (on file with counsel of record) ("It is hard to imagine that his mother was not drinking when she was pregnant with him because of the significant alcohol abuse in the house.").

[22] *See, i.e.*, Penalty Phase Tr. at 78-79 (test. of Dr. Glenn Galloway).

[23] *See Thompson* v. *State*, 648 So. 2d 692, 697 (Fla. 1994) (noting that the Florida Supreme Court has an established practice of following "the approach suggested by the United States Supreme Court" and treating low intelligence as a significant mitigating factor in capital cases); *Arbelaez* v. *State*, 898 So. 2d 25,34 (Fla. 2005) (finding deficient performance of trial court counsel in a death penalty case for failing to investigate defendant's low intelligence because "we have . . . elected to . . . treat low intelligence as a significant mitigating factor" (omissions in original) (citing *Crook* v. *State*, 813 So. 2d 68, 76 (Fla. 2002)).

The trial court denied Mr. Lawrence's petition for state post-conviction relief on October 11, 2000. And on October 17, 2002, the Supreme Court of Florida affirmed. *Lawrence* v. *State*, 831 So. 2d 121 (Fla. 2002). The Supreme Court of Florida issued its mandate on November 18, 2002.[24] Counsel filed a petition for writ of certiorari in this Court on January 9, 2003.

At issue here is whether Mr. Lawrence's petition for certiorari, seeking this Court's review of the state's denial of post-conviction relief, further tolled the AEDPA statute of limitations.

E. Mr. Lawrence's Petition For Writ Of Habeas Corpus.

Mr. Lawrence filed a pro se petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 in the Northern District of Florida on March 11, 2003.[25] However, Eleventh Circuit case law then (as now) held that his petition for certiorari did not toll the AEDPA limitations period. *Coates* v. *Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000). Under that rule, Mr. Lawrence should have filed his § 2254 habeas petition in federal court 112 days earlier, on November 19, 2002, one day after the Supreme Court of Florida issued its mandate affirming the denial of post-conviction relief. Plainly, Mr. Lawrence's state post-conviction counsel operated under the mistaken belief

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[24] *See* Case Information/Progress Docket, No. 94-397-CFA (Santa Rosa County, Fla. Cir. Ct.).

[25] The pro se nature of the filing is not explained by the record. The petition is type-written even though Mr. Lawrence had neither access to a typewriter or computer, nor the ability to produce such a document. The nature of the document and the timing of its filing – just thirteen days before this Court denied certiorari on March 24, 2003 – suggests that Mr. Lawrence received the on-going assistance and advice of state post-conviction counsel that was informed both by the belief that he would have only one day left under the AEDPA statute in the event of a denial and attention to the Court's conference docket.

that the timely filed petition for certiorari seeking review of the Supreme Court of Florida's decision tolled AEDPA's limitations period.

The federal district court quickly appointed counsel who filed a supplemental habeas petition. The State responded by urging dismissal on the ground that the petition was time-barred. (J.A. ___) Response To Order To Show Cause By State Of Florida, No. 3:03-Cv-00097-RH (N.D. Fl. filed Jan. 12, 2004). The State further contended that equitable tolling was not warranted. (J.A. ___) *Id.* Mr. Lawrence opposed dismissal on the ground that a disagreement among the circuits existed on the question of whether a petition for certiorari to this Court following the denial of state post-conviction relief tolls the AEDPA limitations period. (J.A. ___) Reply To Response To Motion To Amend/Correct, No. 3:03-Cv-00097-RH (N.D. Fl. filed Mar. 30, 2004)

Mr. Lawrence argued in the alternative that equitable tolling was warranted because: (1) counsel who advised him of the timing of his petition was selected, pre-qualified and monitored by the State of Florida under its registry statute; (2) his own mental abilities prevented him from meaningfully participating in a relationship with his counsel; and (3) he had a facially strong constitutional claim. (J.A. ___) *Id.*

On April 12, 2004, the district court *sua sponte* entered an order staying the proceedings. See (J.A. ___) No. 3:03cv97-RH (N.D. Fl. Apr. 12, 2004). Although it rejected Mr. Lawrence's equitable tolling argument, the district court found that the petition's timeliness "depends upon whether the one-year limitations period was tolled during the pendency of Petitioner's petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of his motion for state collateral review." (J.A. ___) *Id.* at 1-2. While noting that the Eleventh Circuit's interpretation of § 2254(d)(2) precluded tolling, the district court observed that a petition for review of a contrary holding by the Sixth Circuit was pending before this Court and ordered that the stay

remain effective until that petition was decided. The State's challenge to the stay on interlocutory appeal was dismissed by the Eleventh Circuit.

Following this Court's decision not to review the Sixth Circuit case,[26] the district court dismissed Mr. Lawrence's petition as time-barred. (J.A. ___) No. 3:03cv97-RH, slip op. at 2 (N.D. Fl. May 27, 2004). Mr. Lawrence then sought a Certificate of Appealability ("COA"), which the district court granted. (J.A. ___) No. 3:03cv97-RH, slip op. at 3 (N.D. Fl. Nov. 15, 2004).

F. Eleventh Circuit Opinion.

The Eleventh Circuit affirmed. Relying upon its opinion in *Coates* v. *Byrd*, the Court held that "the time during which a petition for writ of certiorari is pending, or could have been filed, following the denial of collateral relief in the state courts, is not to be subtracted from the running of time for 28 U.S.C. § 2244(d)(1) statute of limitations purposes." (J.A. ___) *Lawrence*, 421 F.3d at 1225 (alteration omitted) (quoting *Coates*, 211 F.3d at 1227). The court of appeals mentioned the split in the circuits on the statutory tolling issue only in service of its criticism of the district court both for issuing the stay and for issuing the COA. The Eleventh Circuit opined that in light of the *Coates* precedent, the stay caused "needless delay" and amounted to an abuse of discretion by the district court. (J.A. ___) *Id.* at 1224. Again citing *Coates*, the court noted that "binding circuit precedent clearly disposed of the [statutory tolling] issue." (J.A. ___) *Id.* at 1225.

The Eleventh Circuit made no attempt to consider its decision in *Coates* in light of the contrary decision of the Sixth Circuit en banc in *Abela*, even though *Abela* post-dated *Coates* and criticized the rationale supporting the *Coates*

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[26] *Abela* v. *Martin*, 348 F.3d 164 (6th Cir. 2003) (en banc), *cert. denied sub nom. Caruso* v. *Abela*, 541 U.S. 1070 (2004).

decision. The Sixth Circuit observed, for example, that the focus of § 2244(d)(2) is not on the court in which the application for post-conviction relief is pending but rather on the incomplete nature of the application itself as long as further review remains available. *Abela* v. *Martin*, 348 F.3d 164, 170 (6th Cir. 2003) (en banc). Second, the *Abela* court recognized that requiring "a petitioner to file his petition seeking federal habeas corpus relief before he has sought certiorari to the Supreme Court does not promote the finality of state court determinations and encourages the simultaneous filing of two actions seeking essentially the same relief." *Id.* at 171. The Eleventh Circuit offered no response in its *Lawrence* opinion. Nor did it elaborate in any way on its cursory analysis in *Coates*.

SUMMARY OF ARGUMENT

Section 2244(d)(2) tolls the one-year statute of limitations imposed by § 2244(d)(1) while a "properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." Read consistently with each other and with this Court's precedent, these provisions plainly indicate that an application for state post-conviction relief remains pending while a certiorari petition challenging its resolution by the state's highest court may properly be filed or awaits disposition by this Court.

This is a capital case. If the Eleventh Circuit's ruling is affirmed, no federal court will review the merits of Gary Lawrence's underlying constitutional claims before he is put to death or the claims of others who are similarly situated. Petitioner's complete exclusion from federal court rests on a reading of the statute that is wholly inconsistent with its plain language and this Court's recent holding in *Carey* v. *Saffold*, 536 U.S. 214 (2002) interpreting that language. The reading, moreover, is at odds with AEDPA's broader statutory structure, which indicates that when Congress intended to exclude certiorari review from a tolling provision under

AEDPA, it knew how to do so with unmistakable clarity. That same interpretation of § 2244(d)(2) will inevitably lead to absurd results when the Court grants certiorari, reviews the underlying application on the merits, and remands to the state courts for further proceedings.

Furthermore, the Eleventh Circuit's rule is likely to lead to irrational and inefficient piecemeal litigation by encouraging state prisoners trying diligently to preserve their federal constitutional claims to file protective habeas corpus petitions. Finally, state prisoners may simply forgo certiorari review in this Court altogether under the pressure of an unyielding deadline, severely diminishing this Court's ability to evaluate federal constitutional claims that arise in the context of state post-conviction proceedings and to define the contours of federal constitutional claims in other procedural contexts.

If the Eleventh Circuit's statutory construction is adopted, the extraordinary circumstances of this case nonetheless warrant equitable tolling of Mr. Lawrence's AEDPA statute of limitations to permit him to litigate his constitutional claims in a federal forum. First, extreme disorganization within Florida's capital defender program during the relevant period caused 298 out of 365 days to elapse before any appointed counsel took action on Mr. Lawrence's behalf. The Supreme Court of Florida recognized the great inequity of requiring state prisoners to comply with a one-year statute of limitations in the face of Florida's bureaucratic failures and tolled the limitations period for filing an application for state post-conviction relief in Mr. Lawrence's case. The AEDPA one-year limitations period runs concurrently with the state limitations period. Yet the Supreme Court of Florida did not have the authority to toll the AEDPA limitations period concurrently with the state statute even though it was equally impossible for Mr. Lawrence to meet the one-year federal limitations period.

Second, in spite of extensive affirmative guarantees on Florida's part that state appointed counsel would be highly qualified and monitored by the state, post-conviction counsel's interpretation of the AEDPA statute of limitations was erroneous under Eleventh Circuit precedent. Compounded with the time wasted through Florida's administrative delays, post-conviction counsel's error caused Mr. Lawrence's federal habeas petition to be untimely. Accordingly, this Court should grant relief permitting litigation of Mr. Lawrence's underlying constitutional claims in federal court.

ARGUMENT

I. AN APPLICATION FOR STATE POST-CONVICTION RELIEF REMAINS "PENDING" WITHIN THE MEANING OF § 2244(d)(2) DURING THE 90-DAY PERIOD IN WHICH A PETITION FOR REVIEW OF THE STATE COURT DISPOSITION OF THAT APPLICATION CAN PROPERLY BE FILED IN THIS COURT AND FOR THE DURATION OF CERTIORARI REVIEW.

A. The Plain Language Of § 2244(d)(2) Requires Tolling While An Application For State Post-Conviction Review Is Pending On Certiorari.

Section 2244(d)(2) provides for tolling of the one-year statute of limitations imposed by § 2244(d)(1) while a "properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." A plain reading of this language, in light of this Court's recent decisions interpreting these statutory provisions, demonstrates that such an application is "pending" while a certiorari petition challenging its resolution by the state's highest court may properly be filed or awaits disposition by this Court. As a threshold matter, the "application" to which § 2244(d)(2) refers can only be the

original petition or motion for post-conviction relief filed in the state trial court. This Court's review, or the time for seeking such review, is an integral final step in the proceedings on the original application for state post-conviction relief.[27]

Nothing in the AEDPA provisions at issue here alters this Court's long established jurisdiction to review the federal constitutional issues raised in state post-conviction proceedings. Moreover, nothing in §2244(d)(2) specifies that a "pending" application is one that is pending only in state court as opposed to this Court.[28] As long as the matter can still be brought before a court that has authority to review the judgment itself, the original application for post-conviction relief has not achieved final resolution. Because the highest state court's judgment denying collateral relief is subject to further certiorari review in this Court, the application must be deemed pending under § 2244(d)(2) while such a petition is being considered or during the period when a petition could properly be filed.

The Court's decision in *Carey* v. *Saffold*, 536 U.S. 214 (2002), construed the very provision at issue here. In *Saffold*

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[27] Although the Supreme Court's review of a state judgment is limited to federal questions, this Court is nonetheless "a court of *appeal* from the State courts." *Murdock* v. *City of Memphis*, 87 U.S. 590 (1874).

[28] Those circuits that have excluded the certiorari process from the tolling operation of § 2244(d)(2) on the ground that a petition for certiorari is not a "state" proceeding have misconstrued this Court's holding in *Duncan* v. *Walker*, 533 U.S. 167 (2001). *See Rhine* v. *Boone*, 182 F.3d 1153, 1154-55 (10th Cir. 1999); *Coates*, 211 F.3d at 1227. In holding that a federal habeas petition is not an "application for State post-conviction or other collateral review" within the meaning of § 2244(d)(2), the Court simply recognized that a federal habeas petition cannot seek state post-conviction relief and refused to let "unripe" federal habeas petitions toll the AEDPA statute of limitations. *Duncan*, 533 U.S. at 180-81. *Duncan* did not address the very different context of this Court's review of state court dispositions of applications for state post-conviction relief.

the Court firmly rejected California's contention that no application for state collateral relief is "pending" under § 2244(d)(2) between a lower state court's decision on the application and the filing of a notice of appeal to a higher state court as inconsistent with the word's ordinary meaning. *Id* at 219. The Court emphasized that the word "pending" signifies a review process that is "in continuance" or an application that is "not yet decided." *Id.* An application remains pending, the Court elaborated, "until the completion of" the post-conviction review process. In finding that the statute of limitations was tolled between a lower state court's denial of collateral relief and the filing of an appeal, the Court treated the appellate stages of post-conviction review essentially as an extension of the proceedings on the original application. So, too, is the process of seeking certiorari an equally significant extension of the proceedings on the original application. That this final stage in the state post-conviction proceedings occurs in a federal, not a state court, is immaterial to the *Saffold* analysis.

Thus, under *Saffold*, as long as the post-conviction review process is incomplete the application remains pending and the statute of limitations is tolled. The core consideration under *Saffold* is not the court in which review is to take place but the indeterminacy of judgment on the original application for relief while avenues for further review remain available. Certiorari review from state court denial of collateral relief plainly represents such an avenue.

The fact that certiorari is a discretionary writ rather than an appeal of right is insignificant, for that is equally true of petitions for discretionary review to state high courts, which also toll the limitations period. *Id.* at 220-21. Nor does the fact that state prisoners are not required to seek certiorari review prior to filing a habeas petition change the outcome. It is widely accepted that a prisoner's application for state post-conviction relief remains pending while he pursues other avenues of discretionary relief at the state level such as

motions for reconsideration or petitions for rehearing.[29] Certiorari review of post-conviction proceedings in this Court is no different. Finally, under the explicit logic of *Saffold*, whether a petition for certiorari is actually filed or not is immaterial to the application's pendency. In either case, the state court's judgment is subject to potential review by this Court.

B. Tolling The Statute Of Limitations Under § 2244(d)(2) Pending Certiorari Review Is Consistent With AEDPA's Statutory Scheme.

The statutory context of § 2244(d)(2), like its plain meaning, supports tolling of the statute of limitations pending certiorari review. First and foremost, the "trigger" provision, and the tolling provisions specified in § 2244(d)(2), are corresponding parts of AEDPA's statute of limitations scheme; essentially, they constitute a rule and its exception. In *Clay*, 537 U.S. at 527, the Court held that a federal conviction is not "final" until the time to petition for certiorari has expired, and thus strongly suggested that no state court conviction is final under § 2244(d)(1)(A) until the time for filing for certiorari has expired or the petition has been acted upon by the Court. 28 U.S.C. § 2244(d)(1)(A) (specifying in relevant part that the one-year AEDPA limitations period commences on the date judgment becomes "final"). Because of this integral relationship between § 2244(d)(1)(A) and (d)(2), the meaning of "pending" under § 2244(d)(2) should be congruent with the Court's interpretation of "finality" under § 2244(d)(1)(A). In the contexts of review of a state court criminal conviction on direct review and on post-conviction review, the Court's role, function, and jurisdiction are the same; namely to finally determine any appropriate questions of federal law that arise. Accordingly, an

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[29] *See, e.g., Nyland* v. *Moore*, 216 F.3d 1264, 1267 (11th Cir. 2000) (per curiam); *Crawley* v. *Catoe*, 257 F.3d 395, 398 (4th Cir. 2001); *Serrano* v. *Williams*, 383 F.3d 1181 (10th Cir. 2004).

interpretation that harmonizes the two provisions by recognizing that no final state court judgment is complete until the time for filing a petition for certiorari has expired or until the court has acted on a petition simply recognizes the identical nature of this Court's role in each context.

As a procedural matter, this Court treats certiorari petitions seeking review of state court judgments as though they stem from decisions rendered by lower federal courts and are thus part of the ordinary appellate process. The Court's review of a judgment from a state's highest court is "conducted in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree reviewed had been rendered in a court of the United States." *Id.* § 2104. On certiorari review, this Court "may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." *Id.* § 2106. The ultimate effect of this Court's exercise of its authority to review an underlying state court judgment does not depend in any way upon its posture below. Direct appeals from state convictions and state post-conviction proceedings alike cannot be considered final as long as they remain subject to the Court's modification, vacatur, or remand on certiorari review.

Moreover, a close examination of the legislative history of § 2244(d)(1)(A) reveals that Congress had reasons for settling on the wording of the provision that are completely unrelated to any distinction between certiorari review of direct and collateral state proceedings. See *Kapral* v. *United States*, 166 F.3d 565, 577-78 (3d Cir. 1999) (Alito J., concurring). The evolution of § 2244(d)(1)(A) instead represented a congressional effort to divorce the trigger provision from exhaustion requirements.

The proposed initial trigger for the running of the statute of limitations under § 2244(d)(1)(A) was "the date on which state remedies are exhausted." S. 3, 104th Cong. § 508 (1995). Shortly after Senator Dole introduced Senate Bill 3, Senators Specter and Hatch sponsored S. 623, 104th Cong. § 2 (1995), which apparently marks the genesis of the language now codified in § 2244(d)(1)(A). Rather than hinging the trigger provision on the exhaustion requirement, Senate Bill 623 provides that the limitations period commences on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* Senator Specter's introductory remarks make clear that the purpose of the change was to abandon "exhaustion" as the triggering event for the limitations period because the exhaustion trigger facilitated "endless delays" in federal habeas cases. See 141 Cong. Rec. S4592 (daily ed. Mar. 24, 1995). See also *Kapral*, 166 F.3d at 580-81 ("[T]he phrase 'the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review' seems to have been employed to make it clear that the approach taken in S.3 and prior bills was being changed.") (Alito, J., concurring).

This history renders inescapable two important conclusions. The first is that the specific language Congress ultimately enacted in § 2244(d)(1)(A) was chosen for reasons unrelated to the Supreme Court's role in reviewing direct and collateral proceedings. Second, given Congress' clear intent to unmoor the limitations provisions from exhaustion requirements, the fact that certiorari review is not required for exhaustion is simply irrelevant to the meaning of § 2244(d)(2).

AEDPA's broader structure also demonstrates that where Congress intended to circumvent the certiorari process in this Court, it did so with unmistakable clarity. In 28 U.S.C. § 2261 *et seq.* Congress established special habeas corpus procedures for states that "opt in" by complying with, *inter*

alia, specific procedures related to the provision of competent counsel. Although not at issue here, the "opt-in" provisions contain limitations and tolling provisions that are markedly different from those of § 2244(d), a contrast the Court has already found telling in *Duncan* v. *Walker*, 533 U.S. 167, 177-78 (2001). The opt-in tolling provision, § 2263(b)(2), tolls a 180-day limitations period for filing a federal habeas petition "from the date on which the first petition for post-conviction review or other collateral relief is filed until the final *State court* disposition of such petition." 28 U.S.C. § 2263(b)(2) (emphasis added). Thus, while § 2244(d)(2) focuses on the nature of the underlying application as one for "State or other collateral review," under § 2263(b)(2), it is the nature of the court in which the application is being adjudicated that Congress explicitly makes dispositive. Rather than tolling the limitations period while an application for state collateral relief is pending in any court that might properly exercise jurisdiction (including this Court), § 2263(b)(2) expressly tolls it from the point of filing in state court until final disposition in state court.

The Court has observed frequently that "'[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Bates* v. *United States*, 522 U.S. 23, 29-30 (1997) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). The language of § 2263(b)(2) demonstrates that Congress knew how to depart from the established meaning of finality to ensure that the certiorari process would not toll the limitations period. Thus, the proper inference to be drawn from the disparate formulations Congress used is that § 2263(b)(2) does not toll the statute of limitations for the certiorari stage of post-conviction proceedings while § 2244(d)(2) does. Such a difference in treatment, moreover, is fully consistent with the curtailed

nature of the opt-in limitations and tolling provisions as compared to their non-opt-in counterparts.

AEDPA's statutory structure and history make clear there can be no functional difference between finality under 28 U.S.C. § 2244(d)(1)(A) and pendency under 28 U.S.C. § 2244(d)(2). The Court should now alleviate the costly and unnecessary confusion engendered by the Eleventh Circuit's decision here and restore coherence to the legislative scheme by recognizing that a state court application for collateral relief remains pending under § 2244(d)(2) while a petition for certiorari may properly be filed or is under consideration in the same way that a direct appeal cannot be considered final under § 2244(d)(1)(A) until such a petition has been reviewed or the period for filing one has expired. See *Clay*, 537 U.S. at 528 n.3.

C. Tolling Preserves This Court's Institutional Role In Reviewing State Post-Conviction Proceedings.

Tolling the statute of limitations pending this Court's consideration of a petition for certiorari would also properly acknowledge and preserve the Court's unique historical and institutional role in protecting state prisoners from state decisions in violation of federal law or the United States Constitution, a role that differs markedly from that played by any other federal court in adjudicating habeas claims. Although state prisoners would not be precluded legally from filing petitions for certiorari from state court denial of collateral relief by a failure to toll the statute of limitations during that period, the natural effect of such a disposition would be to severely limit or effectively eliminate their right to do so while they expend limited time and resources in preparation of federal habeas petitions. See *Durham* v. *United States*, 401 U.S. 481, 483 (1971) (indicating that Congress has given a right to petition for certiorari), *overruled on other grounds by Dove* v. *United States*, 423 U.S. 325 (1976). If this Court holds that such tolling is

inappropriate, state prisoners may well conclude that the risk of forfeiting their habeas claim is simply too great.

This Court's power and authority to review criminal cases arising from state courts has been firmly established for nearly two centuries. *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821). In fact, the Court's authority in this realm significantly predates the availability of federal habeas corpus relief to state prisoners, beginning only in 1867. See *Fay* v. *Noia*, 372 U.S. 391, 415 (1963) (citing Judiciary Act of February 5, 1867, ch. 28, 61, 14 Stat. 385, 385-86), *abrogated on other grounds by Coleman* v. *Thompson*, 501 U.S. 722, 744-51 (1991). This expansive scope is highlighted by the broad language of 28 U.S.C. § 1257(a), which provides for Supreme Court jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution of . . . the United States."

Tolling the statute of limitations during the pendency of a petition for certiorari from the denial of state post-conviction relief would allow the Supreme Court to reach and resolve some important federal questions free of the complications that would encumber them and bedevil the lower federal courts if prisoners were effectively required to litigate them solely in a federal habeas forum. The opportunity for Supreme Court review may be especially important, for instance, when state post-conviction courts choose to decide the merits of federal constitutional contentions that, in federal habeas corpus proceedings, would be barred or clouded by difficult applications of procedural doctrines peculiar to federal habeas practice, such as the rule of *Teague* v. *Lane*, 489 U.S. 288 (1989). See *Beard* v. *Banks*, 542 U.S. 406, 411-12 (2004) (recognizing that *Teague* may bar federal habeas adjudication of claims that state post-conviction courts elect to entertain); and see, *e.g.*, *Durden* v. *California*, 531 U.S.

1184, 1184 (2001) (Souter, J., dissenting from the denial of certiorari).

Discouraging meritorious petitions for certiorari from state court denial of collateral relief also risks stifling the development of the law in areas where allegations of constitutional violations often cannot be raised on direct review, characteristic examples being *Brady* violations or most ineffective assistance of counsel claims. Review at this stage is especially valuable when the federal question addresses the manner in which state post-conviction proceedings should be conducted or where a valid constitutional claim is raised for the first time at the state post-conviction stage. See *McNeal* v. *Culver*, 365 U.S. 109, 116 (1961) (holding that petitioner was entitled to a hearing on his state habeas corpus claim); *Wilde* v. *Wyoming*, 362 U.S. 607 (1960) (concluding that a state trial court had not held a necessary hearing to determine a federal claim advanced in a petition for state post-conviction relief); *Smith* v. *Texas*, 543 U.S. 37, 48 (2004) (holding on review of state post-conviction proceedings that a "nullification instruction" directing a capital sentencing jury to give effect to mitigating evidence only if the jury answered "no" to at least one of two questions relating to deliberateness and future dangerousness was inadequate under the Eighth Amendment).

Decisions in federal habeas cases also cannot develop or clarify the scope of substantive constitutional protections. Strict statutory and doctrinal standards circumscribe the range of issues that may be litigated in federal habeas corpus proceedings. Under AEDPA, federal habeas relief is only available in the limited circumstance when the state court decision is "contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d); see also *Williams* v. *Taylor*, 529 U.S. 362, 405-07 (2000). A rule that discourages consideration of petitions for certiorari from state court denial of post-conviction relief will

necessarily limit this Court's opportunities to clarify or articulate with precision the contours of any federal constitutional rules because the "reasonableness" buffer mandated by § 2254(d) precludes adjudication on the merits of any constitutional issue that the state courts decided incorrectly but not so incorrectly as to be beyond the range of reasonable mistake.

D. Tolling The Statute Of Limitations Under § 2244(d)(2) Pending Certiorari Review Avoids Absurd And Inequitable Results.

The language of § 2244(d)(2) should be interpreted to avoid absurd results. *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). Yet the Eleventh Circuit's rule would yield just such results when this Court overturns a state court judgment rendered in state post-conviction proceedings and remands the matter to state court for action consistent with the Court's opinion.[10] Under the Eleventh Circuit rule, the Supreme Court stage would inexplicably be excluded from the application's pendency, and the AEDPA limitations period would continue to run, notwithstanding the fact that the basis for the Court's disposition must be the state court's judgment on the underlying application for state post-conviction relief. Yet upon remand for further state proceedings, under the Eleventh Circuit's logic, the application would suddenly once again be "pending" and the statute of limitations would again be tolled, though very likely for an already expired limitations period.

It is precisely such a counterintuitive definition of pendency through fits and starts that this Court rejected in *Saffold*. Excision of the period for seeking Supreme Court review from the natural progression of the application up the chain of review then back down through remand is plainly artificial. Indeed, in an attempt to rationalize the scheme, one federal

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[10] *See, e.g., Bunkley* v. *Florida*, 538 U.S. 835, 842 (2003); *Ozmint* v. *Nance*, 543 U.S. 1043 (2005); 28 U.S.C. § 2106.

district court confronted with a scenario in which a petition for certiorari was granted by this Court, the state court judgment vacated, and the case remanded for further state proceedings, held that the statute of limitations must be considered *retroactively* tolled under § 2244(d)(2) for the entire period the case was pending before the Court. See *Coleman* v. *Davis*, 175 F. Supp. 2d 1109, 1111 (N.D. Ind. 2001). Such a rule, in conditioning the tolling effect of § 2244(d)(2) on the Supreme Court's actual disposition of the case, offers no predictability for state prisoners trying diligently to preserve their federal rights. Even if retroactive tolling were to become the rule for cases in which the Court reverses and remands, it would not be available to those petitioners whose underlying convictions were affirmed.

The state prisoner's only recourse to preserve his federal habeas claim in such a case would be to file a habeas corpus petition even while the Supreme Court actually reviews his state post-conviction application on the merits.[31] While federal district courts might stay habeas proceedings pending this Court's review, this would achieve a result no different than tolling would have done, save for needless expense, confusion, and inefficiency.

Respondent's rule thus forces state prisoners striving diligently to preserve their federal claims to file "protective" and unripe federal habeas claims concurrently with or subsequent to their certiorari petitions, resulting in the

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[31] Numerous habeas petitions have already been dismissed as time-barred when petitioners counted on tolling while they pursued or were entitled to pursue certiorari review of state court denial of post-conviction relief. *See, e.g.*, *Miller* v. *Dragovich*, 311 F.3d 574, 580 (3d Cir. 2002); *White* v. *Klitzkie*, 281 F.3d 920, 924-25 (9th Cir. 2002); *Crawley*, 257 F.3d at 399; *Snow* v. *Ault*, 238 F.3d 1033 (8th Cir. 2001); *Stokes* v. *District Attorney*, 247 F.3d 539 (3d Cir. 2001); *Coates*, 211 F.3d 1225; *Isham* v. *Randle*, 226 F.3d. 691 (6th Cir. 2000), *overruled en banc by Abela*, 348 F.3d 164; *Steed* v. *Head*, 219 F.3d 1287 (11th Cir. 2000); *Orr* v. *Johnson*, 192 F.3d 510 (5th Cir. 1999); *Rhine*, 182 F.3d at 1156.

irrational and inefficient piecemeal litigation that Congress sought to avoid. *Duncan*, 533 U.S. at 180 (declining to interpret § 2244(d)(2) in a way that creates more opportunities for delay and piecemeal litigation). And even these haphazard and absurd results would occur only when pro se prisoners or counsel can avoid the Eleventh Circuit's procedural trap for the unwary; namely the intuitive impression that the potential for review of the post-conviction proceedings continues during the certiorari phase, while in reality the time to file a federal habeas petition is running out.

The Eleventh Circuit's rule would thus lead to a messy procedural landscape as well as inequitable results. Under the guise of promoting comity and federalism, the rule contributes to needless friction between the state courts' interest in full and fair post-conviction proceedings and the federal interest in ensuring that habeas claims are ripe and scrupulously prepared. The time period between the date the criminal conviction becomes final (through and including expiration of the time for filing a petition for certiorari) and the initial application for state post-conviction relief counts against AEDPA's one-year limitations period. *Painter* v. *Iowa*, 247 F.3d 1255, 1256 (8th Cir. 2001); *Curtiss* v. *Mount Pleasant Corr. Facility*, 338 F.3d 851, 856 (8th Cir. 2003). For any number of reasons, most typically the time required for critical new facts to come to light and the state habeas claim to be investigated properly, this time period is often very substantial in capital cases (see *supra*, at 5-11). Here it was 364 days.

It would be a mistake to imagine that the course of state post-conviction proceedings might allow a state prisoner any opportunity to begin to craft a federal habeas petition. The reality is that a litigant can only begin to formulate a germane federal petition after the state post-conviction evidentiary hearing and the judge's disposition. Thus, in the course of investigating and preparing an application for *state* collateral relief, a state prisoner through no fault of his own may

already have used the better part or nearly all of his one-year limitations period for filing a *federal* habeas petition. Tolling the statute during the pendency of a certiorari petition would help alleviate the systemic strain of a zero-sum procedure that forces state prisoners to rush through their investigation and preparation of state post-conviction relief applications, thereby depriving state courts of a full and fair opportunity to pass meaningfully on their federal as well as state claims.

Moreover, it is not only state prisoners who have a vital interest in the availability of certiorari review from state post-conviction proceedings. State officials as well may seek review from the Supreme Court at this stage in order to clarify issues of federal law. See, *e.g.*, *Pennsylvania* v. *Finley*, 481 U.S. 551, 557 (1987) (holding that the state Superior Court improperly extended *Anders* procedures to state post-conviction proceedings); *Florida* v. *Nixon*, 543 U.S. 175, 188-89 (2004) (holding on certiorari review of post-conviction proceedings that counsel's failure to obtain the defendant's express consent to a strategy of conceding guilt in a capital trial does not automatically render counsel's performance deficient). While AEDPA's ticking clock may well force state prisoners to skip the certiorari stage in order to prepare and timely file an initial federal habeas petition, the State suffers from no such dilemma. Because certiorari review in this Court represents the only channel available to the State if the prisoner prevails in state post-conviction proceedings, this Court might then be faced with the anomalous situation of reviewing certiorari petitions from state collateral proceedings when the State loses but rarely when the State wins.

Furthermore, unfairness could result if a state prisoner who wins in the highest state court and has his conviction overturned and sentence vacated is later time-barred under AEDPA because the State petitioned for and obtained certiorari review in this Court. In such a case, a state prisoner would not even have a basis for filing a protective habeas

petition because his underlying conviction and sentence would have been vacated. Thus, failure to toll the statute of limitations could unfairly preclude a state prisoner from filing a timely habeas petition based only on the vagaries of procedural matters entirely outside his control, such as, for example, whether a state court chooses to stay or vacate a judgment for the prisoner at the highest state court level pending this Court's certiorari review. Only a uniform interpretation that synchronizes finality under § 2244(d)(1)(A) with pendency under § 2244(d)(2) would properly take into account the identical nature of this Court's role in both contexts, ensure the smooth progress of state collateral relief proceedings to final resolution, and enable state prisoners who seek to litigate federal claims meaningfully to conform their behavior to the law's commands.

II. EQUITABLE TOLLING IS WARRANTED.

If this Court concludes that filing for a writ of certiorari from state court denial of post-conviction relief does not toll the AEDPA statute of limitations, Mr. Lawrence should still be allowed to pursue federal habeas corpus relief because the facts of this case warrant equitable tolling. A litigant is entitled to equitable tolling of a statute of limitations when he shows that extraordinary circumstances beyond his control prevented the vindication of his rights and that he diligently pursued those rights. See, *e.g.*, *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). In this case, two conditions in Florida so severely impeded Mr. Lawrence's ability to file a timely federal habeas petition as to rise to the level of an extraordinary circumstance. First, extreme disorganization within Florida's capital defender program during a period of significant reform in the structure of that program caused 298 days to elapse before any appointed counsel began to act in Mr. Lawrence's case. This disarray proved so pervasive that the Supreme Court of Florida tolled the limitations period for state post-conviction proceedings in

Mr. Lawrence's case. Second, Mr. Lawrence's state-certified and appointed counsel conducted this case as though a petition for a writ of certiorari at the conclusion of state post-conviction proceedings would toll the AEDPA limitations period. This advice, erroneous under Eleventh Circuit precedent, coupled with the time lost to Florida's administrative delays prior to the start of post-conviction proceedings, prevented Mr. Lawrence from filing a timely federal habeas petition. Moreover, Mr. Lawrence satisfied the diligence requirement for equitable tolling by reasonably relying on the advice of automatically appointed counsel – counsel the state not only set out to ensure would be of high quality but also promised to monitor. His reliance was all the more reasonable given his severe cognitive limitations. Taken in sum, the facts in this case warrant equitable tolling of AEDPA's limitations period so as to allow Mr. Lawrence to pursue the merits of his federal habeas claim.

A. The Facts Of Mr. Lawrence's Case Meet The Established Standards For Equitable Tolling.

Courts evaluate claims for equitable tolling by examining the totality of the circumstances. *E.g.*, *Alvarez-Machain* v. *United States*, 107 F.3d 696, 701 (9th Cir. 1996). The precise elements of the equitable tolling doctrine have long been the subject of confusion and analytical imprecision. Courts and commentators alike have confused equitable tolling with equitable estoppel. The circuits that acknowledge the distinction between these doctrines, including the Eleventh Circuit, note that tolling, unlike estoppel, requires no showing of affirmative misconduct on the part of the opposing party.[32] *Browning* v. *AT&T Paradyne*, 120 F.3d 222, 226 (11th Cir. 1997) ("[Defendant] appears to be confusing, as do many

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[32] To the extent that the Eleventh Circuit's opinion below suggested that such a showing was required, *see* (J.A.__) *Lawrence*, 421 F.3d at 1226, the court went against its own clearly established precedent in *Browning*.

litigants and courts, the doctrines of equitable tolling and equitable estoppel. Equitable estoppel does require an allegation of misconduct on the part of the party against whom it is made, but equitable tolling does not require any misconduct on the part of the defendant.").[33] Although equitable tolling is not appropriate in cases of "garden variety excusable neglect," *Irwin*, 498 U.S. at 96, it should be evaluated on a case-by-case basis and granted in the presence of a "unique, specific set of facts." *Browning*, 120 F.3d at 227.[34] The facts of this case clearly rise to this standard.

Additional interpretive principles support equitable tolling of AEDPA's statute of limitations in this case. First, Mr. Lawrence seeks federal review of a flawed capital conviction, and this Court has recognized repeatedly that capital cases warrant special scrutiny because "death is a different kind of punishment." *Gardner* v. *Florida*, 430 U.S. 349, 357 (1976) (plurality).[35] Moreover, even in the non-capital context this

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[33] *See also Lehman* v. *United States*, 154 F.3d 1010, 1016 (9th Cir. 1998) ("Equitable tolling focuses primarily on *the plaintiff's* excusable ignorance of the limitations period. . . . Equitable estoppel focuses on the actions of *the defendant*."); *Bell* v. *Fowler*, 99 F.3d 262, 266 n.2 (8th Cir. 1996) (noting that unlike equitable estoppel, "equitable tolling does not require any misconduct on the part of the defendant"); *Wolin* v. *Smith Barney Inc.*, 83 F.3d 847, 852 (7th Cir. 1996) ("Equitable tolling is invoked when the prospective plaintiff simply does not have and cannot with due diligence obtain information essential to bringing a suit."), *abrogated on other grounds by Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179 (1997).

[34] *See also Harris* v. *Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000) (describing equitable tolling as "a discretionary doctrine that turns on the facts and circumstances of a particular case . . . [that] does not lend itself to bright-line rules" (quoting *Fisher* v. *Johnson*, 174 F.3d 710, 713 (5th Cir. 1999))).

[35] *See also Ring* v. *Arizona*, 536 U.S. 584, 605-06 (2002) ("[T]here is no doubt that '[d]eath is different.'" (citation omitted) (second alteration in original)); *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976)

Court has noted that the statute of limitations is to be interpreted fairly and in an even-handed fashion. See *Day* v. *McDonough*, 126 S. Ct. 1675 (2006). Procedural rules do not exist to "trap the unwary pro se prisoner." *Slack* v. *McDaniel*, 529 U.S. 473, 487 (2000) (quoting *Rose* v. *Lundy*, 455 U.S. 509, 520 (1982)). Finally, this Court has long held that the doctrine of equitable tolling rests upon the maxim that one may not, as Florida now attempts to do, "take advantage of his own wrong" and that this is a principle "[d]eeply rooted in our jurisprudence . . . and has frequently been employed to bar inequitable reliance on statutes of limitations." *Glus* v. *Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232-33 (1959). Given the extraordinary circumstances in this case, this Court should exercise its equitable powers and toll the AEDPA limitations period to allow Mr. Lawrence to pursue his right to seek federal habeas relief.

B. Florida's Acknowledged Systemic Failures Impeded The Timely Filing Of Mr. Lawrence's Federal Habeas Petition.

This Court denied certiorari following Mr. Lawrence's direct appeal on January 20, 1998, in the midst of a period of tremendous upheaval in Florida's post-conviction system. There was significant administrative confusion surrounding the split of the single office representing all indigent capital defendants on collateral review into three Capital Collateral Regional Counsel (CCRC) offices. From the time they were created, these offices were critically underfunded and understaffed. Additionally, the state created a new document repository for maintaining records in capital post-conviction proceedings. The transition to this new, complex system created substantial delays in accessing documents. Finally, although the state had promised automatically to appoint counsel in all post-conviction proceedings, it lacked a

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("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.").

sufficient number of private attorneys to supplement its capital public defender program. See generally, *Amendments to Florida Rules of Criminal Procedure*, 719 So. 2d 869.

In June 1998, the Supreme Court of Florida recognized that the state's ongoing failures and their virtually certain consequences would make it practically impossible to comply with the statute of limitations. As such, the court issued a tolling order, and specifically listed Mr. Lawrence among those for whom the state's limitations period for post-conviction review would be tolled during this particular time of upheaval. *Id.* app. B. The Supreme Court of Florida, however, was without authority to toll Mr. Lawrence's concurrent AEDPA limitations period. Therefore, his time for filing for federal habeas relief continued to run even while the Supreme Court of Florida's order tolled the limitations period for filing his motion for state post-conviction relief.

Mr. Lawrence was ultimately ensnared in the very trap that led the Supreme Court of Florida to toll his state statute of limitations. Mr. Lawrence should have automatically been appointed counsel within thirty days of January 20, 1998, when this Court issued its denial of certiorari following direct appeal and his sentence became final. See Criminal Justice Comm., *Senate Staff Analysis and Economic Impact Statement of CS/SB 1328*, at 4 (Fla. Mar. 3, 1998) (stating that "the time limitations for filing a 3.850 [motion to initiate post-conviction review] are established with the understanding that the defendant will have counsel assigned and available to begin addressing the defendant's post-conviction issues within thirty days after the judgment and sentence are final.").[36] However, for no other reason than the

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[36] *See also* Fla. R. Crim. P. 3.851 cmt. (1993) (stating that "[C]ounsel should be designated . . . not later than 30 days after the defendant's judgment and sentence of death becomes final . . . . In the event the capital collateral representative is not fully funded and available to provide proper representation . . . the reduction in the time period would not be justified and would necessarily have to be repealed.").

State's own failures, Mr. Lawrence did not receive adequate counsel for 298 days. The administrative chaos that resulted from the transition to the underfunded CCRC offices and the refusals of two appointed attorneys to take the case consumed the vast majority of his state and AEDPA limitations period.

The State's failures already constrained Mr. Lawrence's ability to file an adequate petition. The State's transition to the new document repository system exacerbated the consequences of this needless delay. State-appointed counsel lacked access to the complete record in this case until December 14, 1998 – 337 days after Mr. Lawrence's conviction became final and 92% of the limitations period had elapsed. This left counsel with a wholly inadequate time period in which to investigate and address complex issues involving the performance of Mr. Lawrence's trial counsel, as well as draft the petition itself. Counsel ultimately filed a rushed state post-conviction motion on January 19th, 1999 – with one day left on the one-year AEDPA statute of limitations.[37]

Given that 364 days had expired before assigned counsel filed for state post-conviction relief, the timely filing of Mr. Lawrence's federal habeas petition was practically impossible. Mr. Lawrence was required to exhaust state remedies before he would be eligible for federal habeas relief. While his state post-conviction proceedings were ongoing, it was legally impossible for him to file a federal habeas petition and functionally impossible to prepare it. The Supreme Court of Florida issued the final denial of state post-conviction relief on November 18, 2002. Under the Eleventh Circuit's interpretation of AEDPA, the only day Mr. Lawrence could have filed his federal habeas petition was November 19,

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[37] Clearly dissatisfied with this initial motion for state post-conviction relief, counsel filed an amended petition on April 22, 1999. *See* Am. Mot. for Post-Conviction Relief 3.850, *State* v. *Lawrence*, No. 94-397-CF (Santa Rosa County, Fla. Cir. Ct. Apr. 22, 1999).

2002. For a pro se federal habeas petitioner, such precision is unmanageable.

More compelling circumstances for equitable tolling would be difficult to imagine. The highest court in the state of Florida has already decided that the State's failures were so egregious that Mr. Lawrence could not possibly be expected to meet the requirement of a one-year statute of limitations and tolled the state statute. Of course, the Supreme Court of Florida did not have the authority to toll the AEDPA limitations period concurrently with the state statute even though it was equally impossible for Mr. Lawrence to meet the one-year federal limitations period. The Supreme Court of Florida tolled the state statute for 122 days. Ultimately, Mr. Lawrence's petition for federal habeas relief was only 112 days late. The same compelling circumstances warrant the same relief from AEDPA's statute of limitations – relief that would enable Mr. Lawrence to file a timely federal habeas petition.

C. Mr. Lawrence's Reasonable Reliance On His State-Appointed And Monitored Counsel Prevented Him From Filing A Timely Federal Habeas Petition.

The extraordinary delays caused by Florida's institutional failures left Mr. Lawrence with a razor-thin margin of error. The erroneous advice of his post-conviction counsel eliminated that margin and ultimately prevented him from filing a timely federal habeas petition. Under controlling Eleventh Circuit precedent, Mr. Lawrence's AEDPA statute of limitations expired one day after final state court denial of post-conviction relief. His counsel, however, conducted Mr. Lawrence's case as though he had one day from the time this Court denied certiorari from his post-conviction proceedings. With one day remaining on his AEDPA clock, Mr. Lawrence's right to federal habeas relief was already in jeopardy; his counsel's error proved fatal to his petition.

Mr. Lawrence had every reason to expect that Florida would fulfill its promise of high quality representation. Most notably, in 1999, Florida took the important step of creating an affirmative obligation for the state courts to monitor counsel. Fla. Stat. § 27.11(12) reads:

> The court shall monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation. The court shall also receive and evaluate allegations that are made regarding the performance of assigned counsel. The Chief Financial Officer, the Department of Legal Affairs, the executive director, or any interested person may advise the court of any circumstance that could affect the quality of representation, including, but not limited to, false or fraudulent billing, misconduct, failure to meet continuing legal education requirements, solicitation to receive compensation from the capital defendant, or failure to file appropriate motions in a timely manner.

Although the American Bar Association has recommended such monitoring, Florida still stands as the only state to expressly require it. See Celestine Richards McConville, *Protecting the Right to Effective Assistance of Capital Post-conviction Counsel: The Scope of the Constitutional Obligation to Monitor Counsel Performance*, 66 U. Pitt. L. Rev. 521, 526, 565 (2005). Yet Florida did not keep this promise of vigilance to Mr. Lawrence.

Florida also promised that the counsel it provided in capital post-conviction proceedings would meet minimum requirements of experience and competence by establishing a registry of private attorneys. Fla. Stat. § 27.710. The state legislature required that any attorney appointed in such proceedings would demonstrate experience in the practice of criminal law, both through the amount of time in practice and the number of cases tried. Specifically, the State required that attorneys in the registry have at least three years of experience in the practice of criminal law, and that they have participated

in at least five felony jury trials, five felony appeals, or five capital post-conviction evidentiary hearings. *Id.* § 27.704(2). In so doing, the state promised its indigent capital defendants competence and experience from their counsel.

The Florida state legislature placed limitations on counsel's workload in an effort to further ensure the quality of its registry counsel. Section 27.711(9) provides that an attorney may not represent more than five defendants in capital post-conviction litigation at any time. By restricting the case load of all registry counsel in this way, the Florida legislature sought to guarantee that qualified counsel would have a sufficient amount of time to dedicate to each client and thus would continue to represent inmates in a timely and proficient manner.

Given these minimum qualifications and more importantly the promise of the courts to supervise the automatically appointed counsel, a petitioner had every reason to have faith in the system. This Court established in *Pace* that a petitioner must exercise due diligence in order to invoke equitable tolling, but did not clearly define the specific criteria for such a showing. *Pace* v. *DiGuglielmo*, 544 U.S. 408, 419 (2005). This Court's other precedents, however, provide guidance. A habeas petitioner seeking equitable tolling does not act with due diligence if: (1) the record contains facts which would have put a reasonable litigant on notice that his attorney would not abide by AEDPA's filing deadline, *Williams* v. *Taylor*, 529 U.S. 420, 442 (2000) (examining due diligence in the context of whether a petitioner's failure to develop a factual record in state court precludes a fact hearing in federal court); or (2) if the "petitioner engaged in intentionally dilatory litigation tactics." *Rhines* v. *Weber*, 544 U.S. 269, 278 (2005) (setting forth test for determining whether a petition may be stayed so that petitioner may return to state court to exhaust federal claims in state court). The present record contains no evidence that Mr. Lawrence engaged in dilatory tactics or ignored any indications in the record that

his registry counsel offered incorrect advice as to the federal habeas filing deadline.

On the facts of this case, greater diligence cannot be expected. No petitioner should be required to second guess his or her counsel in order to demonstrate diligence.[38] Certainly this petitioner had ample reason for complete confidence in his registry counsel, who explained AEDPA's tolling provision with conviction and certainty and acted accordingly. At every step, Florida encouraged Mr. Lawrence to rely upon his attorney's interpretation of the AEDPA statute of limitations. Yet, as a result of Mr. Lawrence's good faith and reasonable reliance, he inadvertently forfeited a longstanding federal right.

The State correctly noted in the Eleventh Circuit that a lawyer's mistake is typically not a sufficient basis for equitable tolling. See *Irwin*, 498 U.S. at 96; *Rouse* v. *Lee*, 339 F.3d 238, 248-49 (4th Cir. 2003). Yet the State's own attorneys made a similar mistake when interpreting AEDPA's statute of limitations in the face of the same circuit split that confronted Mr. Lawrence. See *Day*, 126 S. Ct. at 1679.

In addition, courts have shown a particular willingness to toll the statute when faced with questions about the mental competency of those involved in the attorney-client relationship. See *Cantrell* v. *Knoxville Cmty. Dev. Corp.*, 60

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[38] *See Murray* v. *Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring) ("The complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law."); *Rhines*, 544 U.S. at 279 (Souter, J., concurring) (noting that "*pro se* petitioners (as most habeas petitioners are) do not come well trained to address" such "trick[y]" habeas matters as exhaustion). Because of the procedural default and exhaustion doctrines applicable to federal habeas review, thorough knowledge of both capital and federal habeas jurisprudence is essential. *See generally ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, No. 10.15.1 & cmt. (2003).

F.3d 1177, 1180 (6th Cir. 1995); *Calderon* v. *United States Dist. Court*, 163 F.3d 530, 541-42 (9th Cir. 1998) (en banc), *abrogated on other grounds by Woodford* v. *Garceau*, 538 U.S. 202 (2003).[39] Significant questions about Mr. Lawrence's mental competency are present here. He has been found to have a full scale IQ of 81, which is the lowest part of the low average range. This IQ places Mr. Lawrence near the level of legal incompetence[40] and correlates with an inability to process ideas, to plan, to understand, to appreciate relationships, and to understand what goes on in daily life.[41] Other measures of his intellect do not rise even to that level,

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[39] This view is consistent with a general recognition of the need to protect the incompetent from the potential harshness of statutes of limitations that dates back to the foundations of English and American limitations law. *See* Limitations Act, 1623, 21 Jac. 1, c. 16 (Eng.) (exempting persons of *non compos mentis*); *cf. Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879) (noting that Limitations Act was adopted in most American colonies before Revolution); *see also Black's Law Dictionary* 1074 (7th ed. 2003) (defining "non compos mentis" as "1. Insane. 2. Incompetent."). And, as this Court long ago recognized in considering claims for equitable relief from an expired statute of limitations, "greater consideration and care are due to persons known to be unable to take care of themselves than to those who are fully able to do so." *Graffam* v. *Burgess*, 117 U.S. 180, 185 (1886) (granting relief from statute of limitations for woman who had retained counsel to protect her interests).

[40] The American Association on Mental Retardation defines mental retardation as: (1) subaverage general intellectual functioning (*i.e.*, an IQ of approximately 70 to 75 or below) existing concurrently with (2) related limitations in adaptive functioning; and (3) onset before the age of eighteen. Am. Ass'n on Mental Retardation, *Definition of Mental Retardation*, *available at* http://www.aamr.org/Policies/faq_mental_retardation.shtml (last updated Mar. 11, 2005). "Psychologists and other mental health professionals are flexible in their assessment of mental retardation; thus, sometimes a person whose IQ has tested above 70 may be diagnosed as mentally retarded." *Ex parte Briseno*, 135 S.W.3d 1, 7 n.24 (Tex. Crim. App. 2004).

[41] Penalty Phase Tr. at 78-79 (testimony of Dr. Glenn Galloway).

as he reads at the level of an eleven-year-old, has the writing skills of a nine-year-old, and left school in the seventh grade.

Mr. Lawrence's intellectual limitations heightened the impact of his attorney's error. While low intellect alone does not warrant the equitable tolling of the statute of limitations,[42] here Mr. Lawrence's severe cognitive deficiencies left him utterly incapable of safeguarding his legal rights. Furthermore, even if petitioner had the mental acuity to question his attorney's assurances regarding the proper time for filing his habeas petition, the existence of a circuit split on a central issue in this case reveals the complexity of the legal questions presented to Mr. Lawrence and his counsel. Compare *Abela*, 348 F.3d at 165-166, with *Coates*, 211 F.3d at 1227. Petitioner was in no position to effectively question his counsel's unequivocal statement as to the meaning of the law on a point of such ambiguity and complexity.

As a result, he now faces a sentence of death without any federal court review of the merits of his underlying claims. The initial delays and subsequent errors in Mr. Lawrence's representation are hardly "a garden variety claim of excusable neglect" by an attorney, see *Irwin*, 498 U.S. at 96. Florida's Registry Counsel system repeatedly failed Mr. Lawrence, even while it induced reliance given its affirmative protections. Given Mr. Lawrence's mental deficiencies, he reasonably relied on Florida's promises and the advice of his state-appointed counsel. He therefore plainly satisfied the diligence requirement for equitable tolling. His diligence, taken in concert with the extraordinary circumstances that prevented the timely filing of his federal habeas petition, warrants granting equitable tolling of his AEDPA statute of limitations.

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[42] *See Bilbrey* v. *Douglas*, 124 Fed. Appx. 971, 973 (6th Cir. 2005) (dismissing lower court decision to allow equitable tolling because the plaintiff "failed to establish a causal connection between her mental condition and her ability to file a timely petition.").

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Eleventh Circuit Court of Appeals.

Respectfully Submitted,

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ADDENDUM

STATUTORY ADDENDUM

28 U.S.C. § 2244. Finality of determination

* * * *

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

* * * *

28 U.S.C. § 2254. State custody; remedies in Federal courts

* * * *

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal

law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

* * * *

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or

resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section,

and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2261. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment

(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

(b) Counsel.—This chapter is applicable if—

(1) the Attorney General of the United States certifies that a State has established a mechanism for providing counsel in postconviction proceedings as provided in section 2265; and

(2) counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent.

(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record—

(1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

(2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(e) The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254. This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.

28 U.S.C. § 2263. Filing of habeas corpus application; time requirements; tolling rules

(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court

affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

(b) The time requirements established by subsection (a) shall be tolled—

(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;

(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and

(3) during an additional period not to exceed 30 days, if—

(A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254; and

(B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

Fl. Stat. § 27.704. Appointment of assistants and other staff

Each capital collateral regional counsel may:

(1) Appoint, employ, and establish, in such numbers as he or she determines, full-time or part-time assistant counsel, investigators, and other clerical and support personnel who shall be paid from funds appropriated for that purpose. A full-time assistant capital collateral counsel must be a member in good standing of The Florida Bar, with not less than 3 years' experience in the practice of criminal law, and, prior to employment, must have participated in at least five felony jury trials, five felony appeals, or five capital

postconviction evidentiary hearings or any combination of at least five of such proceedings. Law school graduates who do not have the qualifications of a full-time assistant capital collateral counsel may be employed as members of the legal staff but may not be designated as sole counsel for any person.

(2) Contract with private counsel who are members in good standing of The Florida Bar or with public defenders for the purpose of providing prompt and cost-effective representation for individuals who are sentenced to death in this state. A private counsel or public defender under contract with the regional counsel must have at least 3 years' experience in the practice of criminal law, and, prior to the contract, must have participated in at least five felony jury trials, five felony appeals, or five capital postconviction evidentiary hearings or any combination of at least five of such proceedings.

(3) Appoint pro bono assistant counsel, who must be members in good standing of The Florida Bar, and who shall serve without compensation at the discretion of the capital collateral regional counsel.

Fl. Stat. § 27.710. Registry of attorneys applying to represent persons in postconviction capital collateral proceedings; certification of minimum requirements; appointment by trial court

(1) The executive director of the Commission on Capital Cases shall compile and maintain a statewide registry of attorneys in private practice who have certified that they meet the minimum requirements of s. 27.704(2), who are available for appointment by the court under this section to represent persons convicted and sentenced to death in this state in postconviction collateral proceedings, and who have attended within the last year a continuing legal education program of at least 10 hours' duration devoted specifically to the defense of

capital cases, if available. Continuing legal education programs meeting the requirements of this rule offered by The Florida Bar or another recognized provider and approved for continuing legal education credit by The Florida Bar shall satisfy this requirement. The failure to comply with this requirement may be cause for removal from the list until the requirement is fulfilled. To ensure that sufficient attorneys are available for appointment by the court, when the number of attorneys on the registry falls below 50, the executive director shall notify the chief judge of each circuit by letter and request the chief judge to promptly submit the names of at least three private attorneys who regularly practice criminal law in that circuit and who appear to meet the minimum requirements to represent persons in postconviction capital collateral proceedings. The executive director shall send an application to each attorney identified by the chief judge so that the attorney may register for appointment as counsel in postconviction capital collateral proceedings. As necessary, the executive director may also advertise in legal publications and other appropriate media for qualified attorneys interested in registering for appointment as counsel in postconviction capital collateral proceedings. Not later than September 1 of each year, and as necessary thereafter, the executive director shall provide to the Chief Justice of the Supreme Court, the chief judge and state attorney in each judicial circuit, and the Attorney General a current copy of its registry of attorneys who are available for appointment as counsel in postconviction capital collateral proceedings. The registry must be indexed by judicial circuit and must contain the requisite information submitted by the applicants in accordance with this section.

(2) To be eligible for court appointment as counsel in postconviction capital collateral proceedings, an attorney must certify on an application provided by the executive director that he or she satisfies the minimum requirements for private counsel set forth in s. 27.704(2).

(3) An attorney who applies for registration and court appointment as counsel in postconviction capital collateral proceedings must certify that he or she is counsel of record in not more than four such proceedings and, if appointed to represent a person in postconviction capital collateral proceedings, shall continue such representation under the terms and conditions set forth in s. 27.711 until the sentence is reversed, reduced, or carried out or unless permitted to withdraw from representation by the trial court. The court may not permit an attorney to withdraw from representation without a finding of sufficient good cause. The court may impose appropriate sanctions if it finds that an attorney has shown bad faith with respect to continuing to represent a defendant in a postconviction capital collateral proceeding. This section does not preclude the court from reassigning a case to a capital collateral regional counsel following discontinuation of representation if a conflict of interest no longer exists with respect to the case.

(4) Each private attorney who is appointed by the court to represent a capital defendant must enter into a contract with the Chief Financial Officer. If the appointed attorney fails to execute the contract within 30 days after the date the contract is mailed to the attorney, the executive director of the Commission on Capital Cases shall notify the trial court. The Chief Financial Officer shall develop the form of the contract, function as contract manager, and enforce performance of the terms and conditions of the contract. By signing such contract, the attorney certifies that he or she intends to continue the representation under the terms and conditions set forth in the contract until the sentence is reversed, reduced, or carried out or until released by order of the trial court.

(5)(a) Upon the motion of the capital collateral regional counsel to withdraw pursuant to s. 924.056(1)(a); or

(b) Upon notification by the state attorney or the Attorney General that:

1. Thirty days have elapsed since appointment of the capital collateral regional counsel and no entry of appearance has been filed pursuant to s. 924.056; or

2. A person under sentence of death who was previously represented by private counsel is currently unrepresented in a postconviction capital collateral proceeding, the executive director shall immediately notify the trial court that imposed the sentence of death that the court must immediately appoint an attorney, selected from the current registry, to represent such person in collateral actions challenging the legality of the judgment and sentence in the appropriate state and federal courts. The court shall have the authority to strike a notice of appearance filed by a Capital Collateral Regional Counsel, if the court finds the notice was not filed in good faith and may so notify the executive director that the client is no longer represented by the Office of Capital Collateral Regional Counsel. In making an assignment, the court shall give priority to attorneys whose experience and abilities in criminal law, especially in capital proceedings, are known by the court to be commensurate with the responsibility of representing a person sentenced to death. The trial court must issue an order of appointment which contains specific findings that the appointed counsel meets the statutory requirements and has the high ethical standards necessary to represent a person sentenced to death.

(6) More than one attorney may not be appointed and compensated at any one time under s. 27.711 to represent a person in postconviction capital collateral proceedings. However, an attorney appointed under this section may designate another attorney to assist him or her if the designated attorney meets the qualifications of this section.

Fl. Stat. § 27.711. Terms and conditions of appointment of attorneys as counsel in postconviction capital collateral proceedings

* * * *

(8) By accepting court appointment under s. 27.710 to represent a capital defendant, the attorney agrees to continue such representation under the terms and conditions set forth in this section until the capital defendant's sentence is reversed, reduced, or carried out, and the attorney is permitted to withdraw from such representation by a court of competent jurisdiction. However, if an attorney is permitted to withdraw or is otherwise removed from representation prior to full performance of the duties specified in this section, the trial court shall approve payment of fees and costs for work performed, which may not exceed the amounts specified in this section. An attorney who withdraws or is removed from representation shall deliver all files, notes, documents, and research to the successor attorney within 15 days after notice from the successor attorney. The successor attorney shall bear the cost of transmitting the files, notes, documents, and research.

(9) An attorney may not represent more than five defendants in capital postconviction litigation at any one time.

* * * *

(12) The court shall monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation. The court shall also receive and evaluate allegations that are made regarding the performance of assigned counsel. The Chief Financial Officer, the Department of Legal Affairs, the executive director, or any interested person may advise the court of any circumstance that could affect the quality of representation, including, but not limited to, false or fraudulent billing, misconduct, failure to meet continuing legal education requirements, solicitation to

receive compensation from the capital defendant, or failure to file appropriate motions in a timely manner.

* * * *

CERTIFICATE OF SERVICE

No. 05-8820

Gary Lawrence,

Petitioner,

v.

State of Florida,

Respondent.

I, Carter G. Phillips, do hereby certify that, on this twenty-sixth day of June, 2006, I caused a copy each of the Brief For The Petitioner and Joint Appendix in the foregoing case to be served by first class mail, postage prepaid, on the following party:

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No. 05-8820

In The
Supreme Court of the United States
October Term, 2006

GARY LAWRENCE,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED (RESTATED)

I. Under 28 U.S.C. § 2244(d)(2) of the Antiterrorism and Effective Death Penalty Act (AEDPA), is the period of limitations tolled during the time in which a petition for writ of certiorari may be filed following denial of state postconviction relief?

II. Does lack of knowledge of the AEDPA limitations period constitute an "extraordinary circumstance" entitling a habeas petitioner to equitable tolling?

III. Does an error by state appointed counsel as to the AEDPA limitations period constitute an "extraordinary circumstance" entitling a habeas petitioner to equitable tolling?

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STATEMENT OF THE CASE

Petitioner, Gary Lawrence, was convicted by a Florida jury of first-degree murder, conspiracy to commit murder, auto theft, and petty theft, and a Florida trial court sentenced him to death.[1] The Florida Supreme Court affirmed Petitioner's conviction and sentence on direct appeal, *Lawrence v. State*, 698 So. 2d 1219 (Fla. 1997), and this Court denied certiorari on January 20, 1998. *Lawrence v. Florida*, 522 U.S. 1080 (1998).

On January 19, 1999, 364 days later, Petitioner filed an application for state post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.851. After the trial court denied Petitioner's motion, he filed a state petition for writ of habeas corpus with the Florida Supreme Court. The Florida Supreme Court affirmed the denial of Petitioner's motion for post-conviction relief and denied his petition for habeas corpus on October 17, 2002. *Lawrence v. State*, 831 So. 2d 121 (Fla. 2002). Petitioner did not move for rehearing and the Florida Supreme Court issued its mandate on November 18, 2002.

Even though Petitioner's state post-conviction claims were fully exhausted on November 18, 2002, he did not file a federal habeas petition until March 11, 2003, 144 days after the Florida Supreme Court's opinion was issued, and, based on then settled case law, 113 days after the deadline. Instead, Petitioner filed a certiorari petition in this Court on January 9, 2003. Petitioner's federal habeas petition raised the same arguments that were raised in his motion for state post-conviction relief. *Compare* J.A. 24-27 *with* J.A. 31-34; *compare* J.A. 28 *with* J.A. 35; and *compare* J.A. 28 *with* J.A. 37.[2] The State argued in response that

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[1] The facts of Petitioner's heinous crimes are summarized by the Eleventh Circuit in *Lawrence v. Florida*, 421 F.3d 1221, 1222-23 (11th Cir. 2005). J.A. 112-14.

[2] Appointed counsel subsequently filed an amended habeas petition raising claims not raised in the initial habeas petition. J.A. 41-54.

the habeas petition should be dismissed as untimely and that equitable tolling should not apply. J.A. 55-77. Petitioner then claimed a circuit split had developed on the question of whether a petition for certiorari to the U.S. Supreme Court following the denial of state post-conviction relief tolls the limitation period. J.A. 78-91. Petitioner also sought to invoke the doctrine of equitable tolling on the grounds that (1) counsel who advised him of the timing of his petition was selected by and pre-qualified by the State of Florida under its registry statute; (2) his mental abilities prevented him from meaningfully participating in a relationship with his counsel; and (3) he had a facially strong constitutional claim. J.A. 114.

The district court dismissed the petition as untimely, but granted a certificate of appealability ("COA") to address "whether the one-year limitations period applicable to a petition for writ of habeas corpus under 28 U.S.C. § 2254 barred [Petitioner's] petition, and . . . whether the statute of limitations is tolled during the pendency of a petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of petitioner's earlier motion for state collateral review." J.A. 109. The Eleventh Circuit affirmed, holding that a COA should not have been granted on the one-year limitations question because it had previously held "[t]he time during which a petition for writ of certiorari is pending, or could have been filed, following the denial of collateral relief in the state courts, is not to be subtracted from the running of time for 28 U.S.C. § 2244(d)(1) statute of limitations purposes." J.A. 118. The court further held equitable tolling did not apply. J.A. 120.

SUMMARY OF ARGUMENT

AEDPA is structured to ensure habeas litigants first exhaust all state remedies and then promptly file their federal habeas petitions. The plain language of § 2244(d)(2) accomplishes this result by tolling AEDPA's limitations period only until state court remedies are exhausted. Tolling applies only while state post-conviction proceedings are pending in state court. Certiorari petitions seeking review of state post-conviction decisions are simply not an integral part, nor any part, of the state process. Once state post-conviction proceedings have been completed in state court, a habeas petitioner is free to file, and consonant with AEDPA's mandate to expedite the post-conviction process should file, any federal habeas claims. Petitioner's construction not only contravenes this mandate, but also encourages the filing of frivolous certiorari petitions for the sole purpose of tolling the limitations period.

At the time Petitioner's habeas petition was due, the Eleventh Circuit, and every other circuit court to have addressed the issue, agreed AEDPA's limitations period was not tolled during the time in which a certiorari petition from a denial of state post-conviction relief could be filed. Petitioner's ignorance of this settled law does not amount to an extraordinary circumstance beyond his control and unavoidable even with diligence. Therefore, to the extent equitable tolling applies to the AEDPA period of limitations, it is not proper in this case.

Petitioner's claims of attorney error in the habeas process are essentially claims of ineffective assistance of post-conviction counsel, claims not cognizable in a federal habeas proceeding. Given same, these claims cannot constitute an extraordinary circumstance warranting equitable tolling of the AEDPA limitations period. Moreover, Courts have held routinely that negligence or misadvice by counsel does not warrant equitable tolling. Also, since there is no constitutional right to post-conviction counsel, and the state had no duty to appoint counsel for Petitioner, acceptance of Petitioner's argument would punish

Florida and other states for choosing to provide such counsel. Finally, Petitioner's allegations regarding the disorganization of Florida's registry counsel program are irrelevant, as any alleged disorganization did not cause Petitioner to file his habeas petition late. Once the Florida Supreme Court issued its decision affirming the denial of state post-conviction relief, thirty days passed until the Court issued its mandate, and thirty-one days passed until Petitioner's habeas petition was time-barred. If Petitioner had exercised due diligence, he could easily have timely filed his habeas petition, particularly since his petition raised the same claims previously presented in his state proceedings.

ARGUMENT

I. THE AEDPA LIMITATIONS PERIOD IS NOT TOLLED DURING THE TIME IN WHICH A CERTIORARI PETITION MAY BE FILED FOLLOWING DENIAL OF STATE POST-CONVICTION RELIEF

The AEDPA limitations period begins to run when a conviction becomes final, and is tolled only during the pendency of an "application for State post-conviction or other collateral review." 28 U.S.C. § 2244(d)(2). As ten of the eleven circuits to consider this issue have held, the time during which certiorari may be sought after a final state court denial of post-conviction relief is not tolled under § 2244(d)(2).[3]

A. The plain language of § 2244(d)(2) tolls the limitations period only until state court remedies are exhausted.

Section 2244(d)(2) specifies that the statute of limitations is tolled only during the period in which "a properly filed application for State post-conviction or other collateral review

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[3] *See David v. Hall*, 318 F.3d 343, 345 (1st Cir.), *cert. denied*, 540 U.S. 815 (2003); *White v. Klitzkie*, 281 F.3d 920, 924 (9th Cir. 2002); *Smaldone v. Senkowski*, 273 F.3d 133, 137-38 (2d Cir. 2001), *cert. denied*, 535 U.S. 1017 (2002); *Crawley v. Catoe*, 257 F.3d 395, 401 (4th Cir. 2001), *cert. denied*, 534 U.S. 1080 (2002); *Miller v. Dragovich*, 311 F.3d 574, 576 (3d Cir. 2002), *cert. denied* 540 U.S. 859 (2003); *Snow v. Ault*, 238 F.3d 1033, 1035-36 (8th Cir.), *cert. denied*, 532 U.S. 998 (2001); *Gutierrez v. Schomig*, 233 F.3d 490, 492 (7th Cir. 2000), *cert. denied*, 532 U.S. 950 (2001); *Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000), *cert. denied*, 531 U.S. 1166 (2001); *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999), *cert. denied*, 592 U.S. 1099 (2000); *Rhine v. Boone*, 182 F.3d 1153, 1156 (10th Cir. 1999), *cert. denied*, 528 U.S. 1084 (2000); *but see Abela v. Martin*, 348 F.3d 164, 172-73 (6th Cir. 2003) (en banc) (Martin, J., writing for majority in 6-5 decision), *cert. denied*, 541 U.S. 1070 (2004).

with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). A petition for certiorari is simply not an "application for State post conviction" relief nor for "other [State] collateral review." Thus, under the plain language of the statute, an application for state post-conviction review cannot be considered pending after *state* avenues for appeal have been exhausted.

The AEDPA limitations period is tolled under § 2244(d)(2) only until state remedies actually are exhausted. "[E]xhaustion does not include seeking certiorari from the state court's denial of post-conviction relief." *Fay v. Noia*, 372 U.S. 391, 435-38 (1963); *County Court of Ulster County, N.Y. v. Allen*, 442 U.S. 140, 149 n.7 (1979). In a Florida capital case, once the Florida Supreme Court has denied post-conviction relief, there are no other state avenues for appeal and state remedies have been exhausted. Contrary to Petitioner's argument, certiorari review of State post-conviction proceedings is not "an integral final step." Pet. Br. at 17; *see Rhine v. Boone*, 182 F.3d 1153, 1156 (10th Cir. 1999) ("Exhaustion of state remedies . . . does not include a direct appeal to the United States Supreme Court from the state's denial of post-conviction relief, and neither is a federal court's jurisdiction to entertain a habeas petition affected by whether or not review of the state's denial of post-conviction relief is sought in the Supreme Court."). Indeed once state post-conviction proceedings have been completed in state court, a habeas petitioner is free to file, and consonant with AEDPA's mandate to expedite the post-conviction process should file, any federal habeas claims. "Section 2244(d)(1)'s limitation period and § 2244(d)(2)'s tolling provision, together with § 2254(b)'s exhaustion requirement, encourage litigants first to exhaust all state remedies and then to file their federal habeas petitions as soon as possible." *Duncan v. Walker*, 533 U.S. 167, 181 (2001).

In *Duncan*, this Court considered whether the filing of a federal habeas petition constitutes "other collateral review" under § 2244(d)(2). The Court concluded the word "State" in

"State post-conviction or other collateral review" modified both "post-conviction" and "other collateral review." The Court then held that a federal habeas petition is not an "application for State post-conviction or other collateral review" within the meaning of § 2244(d)(2), and does not toll the period of limitations. *Duncan*, 533 U.S. at 181.

One year later, in *Carey v. Saffold*, 536 U.S. 214 (2002), this Court considered whether an application for State post-conviction relief remained "pending" within the meaning of § 2244(d)(2) during periods in a State's post-conviction process in which a criminal defendant's application for relief was momentarily not under court consideration. *Id.* at 217. Answering the question in the affirmative, the Court held the application remains "pending" for § 2244(d)(2) purposes "until the application has achieved final resolution through the *State's* post-conviction procedures." *Id.* at 220 (emphasis added). The Court explained in *Carey* that the ordinary meaning of "pending" is "in continuance" or "not yet decided" when used as an adjective, and "through the period of continuance . . . of" or "until the . . . completion of" when used as a preposition. *Id.* at 219-220. The Court held that an application under § 2244(d)(2), is pending "as long as the ordinary state collateral review process is 'in continuance'--i.e., 'until the completion of' that process. In other words, until the application has achieved final resolution through the *State's* post-conviction procedures, by definition it remains 'pending.'" *Id.* at 219-20 (emphasis added).

Duncan and *Carey* thus compel the conclusion that the AEDPA limitations period is tolled under § 2244(d)(2) only until final resolution has been achieved through the *State's* post-conviction procedures (i.e., such time as *state* avenues for appeal have been exhausted), and tolling does not extend to the filing of certiorari petitions.[4]

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[4] Lawrence argues that no distinction can be drawn for tolling purposes between cases where a certiorari petition is timely filed and cases where a

Much of Petitioner's argument hinges on both the language of § 2244(d)(1)(A) and this Court's construction of that language. Under that section, AEDPA's one year period of limitation begins to run on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The courts of appeals have interpreted the phrase "final by the conclusion of direct review" to include an opportunity to seek certiorari from this Court. *Clay v. United States*, 537 U.S. 522, 528 (2003). As the Tenth Circuit recognized in *Rhine v. Boone*, 182 F.3d 1153, 1155 (10th Cir. 1999), "[i]t would not be in the interest of judicial efficiency to require a prisoner to begin post-conviction proceedings before his judgment of conviction was final, and that is why the relevant statutes hinge the running of the limitation period on the finality of the judgment of conviction. . .."

However, the question of when a conviction becomes final so as to start the running of the statute of limitations under § 2244(d)(1)(A), is fundamentally different from the question of when the statute of limitations is tolled under § 2244(d)(2). *See White v. Klitzkie*, 281 F.3d 920, 924 (9th Cir. 2002). Sections (d)(1)(A) and (d)(2) contain different language and effect different purposes. "Unlike § 2244(d)(1)(A), which uses the phrase 'became final by . . . expiration of the time for seeking [direct] . . . review,' a phrase that . . . takes into account certiorari proceedings, § 2244(d)(2) contains no such language." *Stokes v. Dist. Attorney*, 247 F.3d 539, 542 (3d Cir. 2001). Instead, this language is consistent with the § 2254 requirement that a state prisoner exhaust state remedies prior to filing a federal habeas petition. *See* 28 U.S.C. § 2254 (b)(1)(A); *Serrano v. Williams*, 383 F.3d 1181, 1184 (10th Cir. 2004) ("In our decisions, we have construed the pendency of a state post-

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certiorari petition is not timely filed. Pet. Br. at 18-19. Whether a distinction could be drawn in such cases in light of this Court's holdings in *Carey* and *Evans v. Chavis*, 126 S. Ct. 846 (2006), however, is not before this Court, as Lawrence timely filed his certiorari petition.

conviction application as encompassing all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies.").

The textual distinctions between § 2244(d)(1)(A) and § 2244(d)(2) suggest that Congress did not intend section 2244(d)(2) tolling to apply to potential Supreme Court review. Congress knew how to include the certiorari period in a statutory timeframe, as it did so in § 2244(d)(1)(a). By omitting such language from § 2244(d)(2), Congress excluded potential Supreme Court review as a basis for tolling the one year limitations period. *See Duncan*, 533 U.S. at 174 ("'It is well settled that 'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (quoting *Bates v. United States*, 522 U.S. 23, 29-30 (1997)); *see also*, *Crawley v. Catoe*, 257 F.3d 395, 400 (4th Cir. 2001) ("The very difference of wording in the two code sections indicates that they do not mean the same and is an indication that § 2244(d)(2) refers only to the state proceedings rather than to federal proceedings also."); *Snow v. Ault*, 238 F.3d 1033, 1035-36 (8th Cir. 2001) ("unlike § 2244(d)(1)(A), which uses the phrase 'became final by ... expiration of the time for seeking [direct] ... review,' a phrase that . . . takes into account certiorari proceedings, § 2244(d)(2) contains no such language."); *Rhine v. Boone*, 182 F.3d 1153, 1155 (10th Cir. 1999)("tolling provision in § 2244(d)(2) is distinguishable from § 2244(d)(1)(A)").

Congress's intent to synchronize the tolling period with the § 2254(b)(1)(a) exhaustion requirement is also demonstrated by the language of § 2263(b)(2), the opt in statute's counterpart to § 2244(d)(2). While the language used by Congress in § 2263(b)(2) is more specific than that in § 2244(d)(2), these sections accomplish the same purpose: tolling the limitations period until state remedies are exhausted as required by § 2254.

Congress did not demonstrate a "clear intent to unmoor the limitations provisions from exhaustion requirements," as alleged by Petitioner. Pet. Br. at 21. The Violent Crime Control and Law Enforcement Improvement Act of 1995, introduced by Senator Dole, did not contain a tolling provision, but instead provided that the one year limitations period begins to run on "the date on which state remedies are exhausted." S. 3, 104th Cong. § 508 (1995). The subsequently introduced Habeas Corpus Reform Act of 1995, which contains the current § 2244(d) language, provided that the limitations period begins to run upon conclusion of direct review, but also added the § 2244(d)(2) tolling provision during such time as state remedies are being exhausted. 141 Cong. Rec. S4592 (daily ed. Mar. 24, 1995). The result of this change in language is to ensure that state prisoners begin to exhaust their state remedies as soon as possible. *See Kapral v. United States*, 166 F.3d 565, 580-81 (3d Cir. 1999) (Alito, J., concurring) ("it is reasonable to infer that the reason for the new approach taken in S.623 was to force state prisoners, upon the completion of direct review, promptly to commence either a state post-conviction relief proceeding (which would toll the limitation period) or a federal habeas proceeding.") Thus, the current language of the AEDPA is still tied to state exhaustion and differs from that in the Violent Crime Control and Law Enforcement Improvement Act of 1995 only to the extent that it eliminates the ability of state prisoners to delay exhaustion of their state remedies.

B. Section 2244(d)(2) effectuates AEDPA's fundamental purposes.

Requiring habeas petitioners to seek federal relief promptly following exhaustion of State post-conviction remedies fulfills AEDPA's goal to further the interests of finality and comity. Section 2244(d)(2) achieve this goal by tolling the limitations period only while State post-conviction remedies are pursued and exhausted. *Snow*, 238 F.3d at 1036 ("[T]his result comports

with the requirement that a state prisoner exhaust state remedies before filing a federal habeas petition."). Prior to AEDPA's passage there was no statute of limitations governing federal habeas petitions. Consequently, state prisoners, particularly those sentenced to death, had a tremendous incentive to delay filing their habeas petitions. *See McCleskey v. Zant*, 499 U.S. 467, 491-92 (1991); *see also, e.g.*, Report on Habeas Corpus in Capital Cases, 45 Crim. L. Rep. (BNP) 3239, 3240 (1989) ("litigation of constitutional claims often comes only when prompted by the setting of an execution date"); 142 Cong Rec H3605, H3606 (1996) (statement of Rep. Hyde) (describing then-ubiquitous delays in habeas proceedings in capital cases as "ridiculous"); 142 Cong. Rec. S3454, S3471-72 (1996) (statement of Sen. Specter) (describing delays inherent in the pre-AEDPA habeas statutory scheme). "Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases," and to further the principles of comity, finality, and federalism. *Woodford v. Garceau*, 538 U.S. 202, 206 (2003); *see also Williams v. Taylor*, 529 U.S. 362, 386 (2000) (Stevens, J.) ("Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law"); *Mayle v. Felix*, 125 S. Ct. 2562, 2573 (2005) ("Congress enacted AEDPA to advance the finality of criminal convictions."). As this Court has recognized, AEDPA's statutory framework is structured to expedite the postconviction process. "Section 2244(d)(1)'s limitation period and § 2244(d)(2)'s tolling provision, together with § 2254(b)'s exhaustion requirement, encourage litigants first to exhaust all state remedies and then to file their federal habeas petitions as soon as possible." *Duncan*, 533 U.S. at 181.

Finality

By establishing strict deadlines for filing federal habeas petitions, AEDPA furthers the interests of finality. "[F]inality is essential to both the retributive and the deterrent functions of criminal law." *Calderon v. Thompson*, 523 U.S. 538, 555 (1998); *see also Teague v. Lane*, 489 U.S. 288, 309 (1989) (plurality opinion) ("Without finality, the criminal law is deprived of much of its deterrent effect."). [5] This is particularly true in the death penalty context, where, as the Eleventh Circuit noted, "[e]ach delay, for its span, is a commutation of a death sentence to one of imprisonment." *Lawrence*, 421 F.3d at 1225.

This Court has recognized the purpose of § 2244(d)(1) was to reform and streamline the habeas process, "reduc[ing] the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Duncan*, 533 U.S. at 179. The limitation period "quite plainly serves the well-recognized interest in the finality of state court judgments," *id.*, and through it, the derivative, equally well-recognized interests in comity and federalism. *See Acosta v. Artuz*, 221 F.3d 117, 123 (2d Cir. 2000) ("The AEDPA statute of limitation promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh, and lends finality to state court judgments within a reasonable time.").

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[5] In addition, commentators have noted that the more prolonged the review process, the greater the risk that the passage of time will preclude any retrial of the defendant and will "reward the accused with complete freedom from prosecution." "[F]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Engle*, 456 U.S. at 128; *see also In re Blodgett*, 502 U.S. 236, 239 (1992) ("None of the reasons offered in the response dispels our concern that the State of Washington has sustained severe prejudice by the 2 1/2-year stay of execution.").

Lack of finality has heightened significance in the context of habeas petitions filed under § 2254 because such petitions implicate comity and federalism concerns. *See McCleskey*, 499 U.S. at 491; *Engle v. Isaac*, 456 U.S. 107, 134 (1982). "Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them." *Calderon*, 523 U.S. at 556 (quoting *McClesky*, 499 U.S. at 491). Liberal allowance of habeas diminishes the significance of state trial court proceedings, *see Brecht v. Abrahamson*, 507 U S. 619, 635 (1993); *Engle*, 456 U.S. at 127, encourages petitioners to relitigate claims on collateral review, *Brecht*, 507 U.S. at 635, and even arguably erodes the quality of state court judging and the morale of state judiciaries, *see Calderon*, 523 U.S. at 555 ("There is perhaps nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else.") (internal quotation omitted); *Engle*, 456 U.S. at 128 n.33. Thus, "[i]ndiscriminate federal intrusions may simply diminish the fervor of state judges to root out constitutional errors on their own." *Id.*

Comity

Coextensive with AEDPA's finality interest is its comity interest. One of the animating principles of habeas corpus jurisprudence is that state courts should have the first opportunity to hear inmates' claims that their convictions should be overturned. *See Coleman v. Thompson*, 501 U.S. 722, 732 (1991); *Ex parte Royall*, 117 U.S. 241, 251 (1886); *see also Rose v. Lundy*, 455 U.S. 509, 518-519 (1982) ("A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error");

O'Sullivan v. Boerckel, 526 U.S. 838, 844 (1999) ("Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief."). For this reason § 2254(b) provides that state remedies must be exhausted prior to the filing of a federal habeas petition.

The exhaustion requirement is satisfied when state prisoners "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *Boerckel*, 526 U.S. at 845. Once all state courts have denied post-conviction relief and all that remains is federal review, state remedies have been exhausted and no comity interest is served by further tolling the time for filing federal habeas petitions.

"A petition for writ of certiorari to the United States Supreme Court is simply not an application for state review of any kind; it is neither an application for state post-conviction review nor an application for other state collateral review." *Crawley*, 257 F.3d at 400 (quoting *Rhine*, 182 F.3d at 1156). At that time, a certiorari petition implicates the same concerns as a subsequent federal habeas petition because it represents an attack in federal court on the integrity of a state court judgment which, until resolved, defeats the finality of the state court judgment. Section 2244(d)(2) only tolls time when "a *state* prisoner is attempting, *through proper use of state court procedures, to exhaust state court remedies*." 28 U.S.C. § 2244(d)(2) (emphasis added). Time spent pursuing *a federal writ* is not "time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies . . . ." *White v. Klitzkie*, 281 F.3d 920, 924 (9th Cir. 2002); *see also Crawley*, 257 F.3d at 400; *Rhine*, 182 F.3d at 1155-56. This view is supported by the text of AEDPA and the policies of comity, federalism and finality that govern habeas proceedings. Because state court review has been exhausted prior to a petition for

certiorari in this Court, there is no comity interest in tolling the limitations period during this Court's review of the certiorari petition.

Section 2244(d) balances finality and comity

Section 2244(d)(2) fully comports with AEDPA's comity interest, without unduly impacting AEDPA's finality interest, only if the tolling period described in the statute is limited to the time necessary for a state prisoner's pursuit of state remedies. "By tolling the limitation period for the pursuit of state remedies . . . § 2244(d)(2) provides a powerful incentive for litigants to exhaust all available state remedies before proceeding in the lower federal courts." *Duncan*, 533 U.S. at 180. "At the same time, the provision limits the harm to the interest in finality by according tolling effect only to 'properly filed applications for State post-conviction or other collateral review.'" *Id.* at 179-80.

Indeed the compromise reached between AEDPA's competing finality and comity interests is evident in § 2244(d). For purposes of finality, the one year limitations period begins to run as soon as a conviction becomes final, i.e., as soon as this Court denies certiorari or the time for filing a petition for certiorari has run, and a prisoner may begin to exhaust his state remedies. For purposes of comity, the limitations period is tolled during such time as state remedies are being exhausted and again for purposes of finality, the period begins to run again as soon as state court remedies have been exhausted. *See Duncan*, 533 U.S. at 179 (purpose of § 2244(d)(2) is to "promote[] the exhaustion of state remedies by protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued."). Tolling the period in which a petition for certiorari could be filed would not further the comity interest as a petition for certiorari in this context represents nothing more than a federal attack on a state conviction. *See Fay*, 372 U.S. at 435-38 ("exhaustion does not

include seeking certiorari from the state court's denial of post-conviction relief"); *County Court of Ulster County, N.Y.*, 442 U.S. at 149 n.7; *see also Rhine*, 182 F.3d at 1156 ("Exhaustion of state remedies, which is a pre-condition to the ability to petition for a writ of habeas corpus, does not include a direct appeal to the United States Supreme Court from the state's denial of post-conviction relief, and neither is a federal court's jurisdiction to entertain a habeas petition affected by whether or not review of the state's denial of post-conviction relief is sought in the Supreme Court."). At the same time, tolling during the certiorari period would hinder AEDPA's finality interest by extending the limitations period.

Petitioner's construction creates a period of time during which a habeas petition *could* be filed, but is not required to be filed. In all other circumstances, the limitations period is tolled only while a federal habeas petition could not properly be filed, i.e., state remedies have not yet been exhausted. Even though the purpose of AEDPA is to require prisoners to pursue promptly any post-conviction remedies, Petitioner's construction of § 2244(d)(2) would permit prisoners to elect not to promptly file their federal habeas petition. This simply contravenes the letter of § 2244(d)(2) and the purposes of AEDPA.

Petitioner also argues that anomalous situations should guide the construction of § 2244(d)(2), Pet. at 26-27; however, such situations are easily cured. In the very rare circumstance noted by Petitioner, where this Court overturns a state court judgment rendered in state post-conviction proceedings after the time for filing a habeas petition has since expired, there is a compelling argument for the application of some form of equitable tolling. In addition to the fact that such circumstances are few and far between,[6] the application of equitable or retroactive tolling cures

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[6] Of the more than 7,000 petitions for certiorari considered in 2004, only one percent of them were granted. The number of such petitions resulting in vacatur of a state grant of post-conviction relief are rarer still. The Supreme Court, 2004 Term: The Statistics, 119 Harv. L. Rev. 415, 425 (2005).

any possible inequity.[7] The fact that in rare circumstances § 2244(d)(2) may operate in a manner that would necessitate application of some equitable remedy does not render the Eleventh Circuit's interpretation of the statute erroneous.

The language used by Congress in § 2244(d)(2) must be construed consistent with the purposes of AEDPA, namely curbing abuse of the writ of habeas corpus. *See* H.R. Rep. No. 104-518, reprinted in 1996 U.S.C.C.A.N. 944. Discarding the construction of § 2244(d)(2) that both accomplishes the purposes of AEDPA and has been adopted by ten of the eleven circuits to have addressed the issue based on the rare circumstance noted above simply goes too far. The correct approach is the construction given to the statute by the majority of the circuits, which appropriately synchronizes the tolling period of § 2244(d)(2) with the exhaustion requirement of § 2254(b)(1)(A).

C. Petitioner's construction of § 2244(d)(2) encourages abuse of the certiorari process.

Petitioner's construction of § 2244(d)(2) provides prisoners an incentive to file frivolous certiorari petitions for the sole purpose of tolling the AEDPA limitations period until such time as the prisoner's certiorari petition is denied. This construction encourages the waste of judicial and state resources on baseless certiorari petitions, particularly given that the costs of filing and responding to the certiorari petitions are shouldered by the state. In the case of capital petitioners, the filing of meritless petitions further abridges the state's interest in imposition of sentences. This Court should not adopt an interpretation of § 2244(d)(2) which would yield such results. Indeed, "[o]ne must question the wisdom . . . of a policy which uses the much scarcer

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[7] The court in *Coleman v. Davis*, 175 F.Supp. 2d 1109 (N.D. Ind. 2001), was presented with such a circumstance and held that the grant of certiorari and vacation of the state court judgment tolled the AEDPA statute of limitations.

resources of the Supreme Court to lighten the burdens of the more numerous district and appellate federal courts." In fact, such a policy "could have a negative impact on comity by diverting the Supreme Court's attention from issues relating to national policy." *Moseley v. Freeman*, 977 F. Supp. 733, 735 (M.D. N.C. 1997). Of course:

> it is conceivable that the Supreme Court might grant a petition for certiorari to review a decision of a state supreme court in a post-conviction relief or other collateral review proceeding and that a petitioner nevertheless in order to avoid the bar of section 2244(d)(1) might file a federal habeas corpus petition that could be pending at the same time that the Supreme Court is considering the petitioner's appeal on the merits. [But] as a practical matter . . . such a situation would [not] be common. In any event, a district court considering the habeas petition in such circumstances would stay the proceedings before it pending the [] Court's disposition of the case.

Miller v. Dragovich, 311 F.3d 574, 580-81 (3d Cir. 2002) (citing *Coleman v. Davis*, 175 F. Supp. 2d 1109, 1110 (N.D. Ind. 2001)) (staying federal habeas proceedings pending final resolution of state post-conviction proceedings remanded to state supreme court by Supreme Court of United States). Further, a 1995 study showed that the median case processing time for all sampled habeas petitions, including those dismissed on procedural matters, was about six months.[8] Cases that were considered on the merits took an average of 477 days to process.[9] Given these

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[8] U. S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Federal Habeas Corpus Review: Challenging State Court Criminal Convictions (Sept. 1995), *available at* http://www.ojp.usdoj.gov/bjs/abstract/fhcrcscc.htm.

[9] *Id.*

timeframes, in many cases certiorari will be denied prior to a district court considering a habeas petition on the merits, rendering a stay unnecessary.

II. IGNORANCE OF THE LAW DOES NOT JUSTIFY EQUITABLE TOLLING.

As of November 18, 2002, the date on which the Florida Supreme Court issued its mandate and Petitioner's state postconviction claims were fully exhausted, there was simply no question the § 2244(d)(2) tolling period did not include the time in which a certiorari petition could be filed. The Eleventh Circuit and every other Circuit to have addressed the issue as of that date, including the Sixth Circuit, had so held.[10] *See White v. Klitzkie*, 281 F.3d 920, 924 (9th Cir. 2002); *Smaldone v. Senkowski*, 273 F.3d 133, 137-38 (2d Cir. 2001); *Crawley v. Catoe*, 257 F.3d 395, 401 (4th Cir. 2001); *Stokes v. Dist. Attorney*, 247 F.3d 539 (3d Cir. 2001); *Snow v. Ault*, 238 F.3d 1033, 1035-36 (8th Cir. 2001); *Gutierrez v. Schomig*, 233 F.3d 490, 492 (7th Cir. 2000); *Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000); *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999); *Rhine v. Boone*, 182 F.3d 1153, 1156 (10th Cir. 1999). The Sixth Circuit did not reverse course until it issued its *en banc* decision in *Abela,* seven months after Petitioner actually filed his federal habeas petition, and eleven months after his state remedies were fully exhausted. *Abela v. Martin*, 348 F.3d 164, 172-73 (6th Cir. 2003) (en banc) (Martin, J., writing for majority in 6-5 decision), *cert. denied*, 541 U.S. 1070 (2004). Given the well settled nature of the law, Petitioner's failure to recognize the deadline for filing his petition amounts simply to ignorance. By exercising due diligence, Petitioner could have discovered when the time for filing his federal habeas petition expired.

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[10] The same was true as of October 17, 2002, the date the Florida Supreme Court issued its opinion.

Instead, he asserts, without evidentiary support, only that the attorney representing him in his state post-conviction proceedings misadvised him as to the deadline for filing his habeas petition. Petitioner does not argue in this case that he attempted to ascertain the filing deadline for his habeas petition.

Therefore, to the extent equitable tolling applies to the AEDPA period of limitations, it is not proper in this case.[11] A litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005) (citing *Irwin v. Dep't of Venterans Affairs*, 498 U.S. 89 (1990)). Courts that have applied equitable tolling in AEDPA cases have acknowledged that it should be applied only in "rare and exceptional circumstances." *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000); *see also Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (equitable tolling is an extraordinary remedy which is typically applied sparingly). As the Fourth Circuit recognized in the AEDPA context, "[a]ny invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes. To apply equity generously would loose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation." *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000). For this reason "any resort to equity must be reserved for those rare instances where--due to circumstances external to the party's own conduct--it would be unconscionable to enforce the limitation period against the party and gross injustice would result. *Id.*

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[11] This Court has "never squarely addressed the question whether equitable tolling is applicable to AEDPA's statute of limitations." *Pace v. DiGuglielmo*, 544 U.S. 408, 417, n.8 (2005).

The extraordinary circumstance asserted by the party seeking equitable tolling must be both "beyond his control and unavoidable even with diligence." *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999). This Court has permitted equitable tolling in situations "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Young v. United States*, 535 U.S. 43, 50 (2002). This Court has not extended equitable tolling to garden variety claims of excusable neglect. *Irwin*, 498 U.S. at 96 (equitable tolling did not apply where petitioner's lawyer was absent from the office when the EEOC notice was received, and petitioner filed within 30 days of the date he personally received notice); *see also Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 560-61 (6th Cir. 2000) (equitable tolling applies only when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control).

Courts have consistently held that ignorance of the law is not a basis for equitable tolling, *see Rose v. Dole*, 945 F.2d 1331, 1335 (6th Cir. 1991), *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000), and a habeas petitioner's ignorance as to the proper calculation of the limitations period for filing a federal habeas petition does not warrant equitable tolling. *See Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000) (a pro se prisoner's incarceration before the enactment of the AEDPA and his lack of notice of the statute of limitations "does not present an extraordinary circumstance warranting equitable tolling"); *Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir. 1999) (ignorance of the law and lack of notice of AEDPA provisions did not merit equitable tolling for pro se petitioner); *Fugate v. Booker*, 321 F. Supp. 2d 857, 860 (E.D. Mich. 2004); *Pearson v. North Carolina*, 130 F. Supp.2d 742, 744 (W.D.N.C. 2001). Given the clear law in the Eleventh Circuit and every other circuit regarding the calculation of the AEDPA limitations period at the

time Petitioner's habeas petition was due, equitable tolling cannot be applied to excuse his lack of diligence. *See Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000) (rejecting argument that equitable tolling applied because prisoner's calculation of the tolling period depended on an interpretation of a novel legal issue and there was an absence of "clear law").

Petitioner's lack of due diligence is likewise not excused by his unsupported allegation that he is "nearly incompetent." Petitioner has never been found to be legally incompetent and by his own assertions he was found to have an IQ in the average to low-average range.[12] Even in cases where a litigant has actually been found to be incompetent, equitable tolling only applies if the lack of competency contributed to the missed deadline. *Bilbrey v. Douglas*, 124 Fed. Appx. 971, 973 (6th Cir. 2005) (equitable tolling did not apply because petitioner "failed to establish a causal connection between her mental condition and her ability to file a timely petition"); *Green v. Hinsley*, 116 Fed. Appx. 749, 751 (7th Cir. 2004) (equitable tolling did not apply because petitioner failed to submit evidence of how his low IQ would render him incompetent or prevent him from timely filing his petition); *Fisher v. Gibson*, 262 F.3d 1135, 1143-45 (10th Cir. 2001) (equitable tolling not justified by petitioner's mere allegations of mental incompetence). In this case Petitioner demonstrated his ability to file pleadings by filing *pro se* his initial petition for federal habeas corpus and a motion for appointment of counsel. Petitioner's low average IQ cannot be an extraordinary circumstance warranting equitable tolling in this case. *See United States. v. Sosa*, 364 F.3d 507, 512-13 (4th Cir. 2004) (equitable tolling not justified despite alleged language difficulties and mental disorders because ignorance of

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[12] Petitioner asserts that he has an IQ of 81. J.A. 120. "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. *Atkins v. Virginia*, 536 U.S. 304, 309 (2002) (citing American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 41, 42-43 (4th ed. 2000)).

the law was not a basis for equitable tolling, and the record refutes language difficulties).

III. DEFICIENCIES IN THE APPOINTMENT OR CONDUCT OF POSTCONVICTION COUNSEL DO NOT JUSTIFY APPLICATION OF EQUITABLE TOLLING

Petitioner's claims of attorney error in the habeas process are essentially claims of ineffective assistance of post-conviction counsel, claims not cognizable in a federal habeas proceeding. Section 2254 expressly provides that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i). Given the fact that such claims are not cognizable in federal habeas proceedings, claims of ineffectiveness or incompetence of post-conviction counsel cannot constitute an extraordinary circumstance warranting equitable tolling of the AEDPA limitations period.

Moreover, courts have held routinely that attorney negligence, even in the AEDPA context, does not justify equitable tolling, *See Sandvik*, 177 F.3d at 1270-72 (refusing to apply equitable tolling where late filing was caused by attorney's use of ordinary mail to send petition less than a week before it was due). Courts have also consistently rejected equitable tolling claims based on an attorney's miscalculation or mistaken representations of the limitations period.[13] The Fourth Circuit

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[13] *Rouse v. Lee*, 339 F.3d 238, 248 (4th Cir. 2003) (errors of counsel in misinterpreting statutory filing requirements was neither extraordinary nor external to Rouse's own conduct); *Fierro v. Cockrell*, 294 F.3d 674, 683 (5th Cir. 2002) ("Counsel's erroneous interpretation of the statute of limitations provision cannot, by itself, excuse the failure to file [the] habeas petition in the district court within the one-year limitations period."); *Smaldone v. Senkowski*, 273 F.3d 133, 138 (2d Cir. 2001) ("Attorney error [is] inadequate

rejected an equitable tolling claim virtually identical to the one at hand. In *Harris v. Hutchinson*, 209 F.3d 325 (4th Cir. 2000), the petitioner claimed he relied on his attorney's misinterpretation of the § 2244(d)(1) limitations period in filing his untimely habeas petition. The Court held "a mistake by a party's counsel in interpreting a statute of limitations does not present the extraordinary circumstance beyond the party's control where equity should step in to give the party the benefit of his erroneous understanding." *Id.* at 331. Likewise, in refusing to apply equitable tolling to a petition for collateral review filed one day late by prisoner's counsel due to incapacity, the Seventh Circuit held that "petitioners bear ultimate responsibility for their filings, even if that means preparing duplicative petitions." *Modrowski v. Mote*, 322 F.3d 965, 968 (7th Cir. 2003) (quoting *Johnson v. McCaughtry*, 265 F.3d 559, 566 (7th Cir. 2001)).

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to create the 'extraordinary' circumstances equitable tolling requires."); *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001) ("We conclude that the miscalculation of the limitations period by Frye's counsel and his negligence in general do not constitute extraordinary circumstances sufficient to warrant equitable tolling."); *Geraci v. Senkowski*, 211 F.3d 6, 9 (2d Cir. 2000) (attorney's misunderstanding of the period for which a claim remained "pending" did not warrant equitable tolling); *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000) (holding that counsel's confusion about AEDPA's statute of limitations does not justify equitable tolling); *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000) ("Any miscalculation or misinterpretation by Steed's attorney in interpreting the plain language of the statute does not constitute an extraordinary circumstance sufficient to warrant equitable tolling."); *Taliani v. Chrans*, 189 F.3d 597, 597-98 (7th Cir. 1999) (equitable tolling not proper where prisoner seeking federal habeas corpus relief claimed that his attorney miscalculated § 2244(d)(1) limitations period due to inadequate research); *see also Merritt v. Blaine*, 326 F.3d 157, 169 (3d Cir. 2003) ("attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling"); *Beery v. Ault*, 312 F.3d 948, 951 (8th Cir. 2002) ("Ineffective assistance of counsel generally does not warrant equitable tolling."); *Fahy v. Horn*, 240 F.3d 239, 244 (3d Cir. 2001) ("attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling"); *Sandvik v. United States*, 177 F.3d 1269, 1270 (11th Cir. 1999) ("mere attorney negligence . . . is not a basis for equitable tolling").

Petitioners, "whether in prison or not, must vigilantly oversee the actions of their attorneys and, if necessary, take matters into their own hands." *Id.* Petitioner failed to exercise due diligence and oversee the actions of his attorney.

The general principle underlying attorney-client relationships is that "lawyers are agents. Their acts (good and bad alike) are attributed to the clients they represent." *Johnson v. McBride*, 381 F.3d 587 589 (7th Cir. 2004) (citing *Pioneer Inv. Services Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 396-97 (1993)). The Sixth Amendment creates an exception to this principle for criminal trials and permits the filing of ineffective assistance of counsel claims. However, "neither the Sixth Amendment nor federal law guarantees effective assistance of counsel for collateral proceedings, not even in a capital case." *Johnson*, 381 F.3d at 589 (citing *Coleman v. Thompson*, 501 U.S. 722, 752-54 (1991)); *see also Murray v. Carrier*, 477 U.S. 478, 488 (1986) ("So long as a defendant is represented by counsel whose performance is not constitutionally ineffective . . . we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default."). Because Petitioner's post-conviction counsel could, *per se*, not have been constitutionally ineffective, the acts of Petitioner's attorney are attributable to Petitioner himself, and cannot be a basis for equitable tolling.[14]

Further, there is no right to counsel in post-conviction relief proceedings, even where a defendant has been sentenced to death. *See Coleman*, 501 U.S. at 756-57 (no right to counsel in federal habeas proceedings, so lack of an attorney will not

[14] Petitioner has presented no evidence that state registry counsel did in fact misadvise him of the deadline for filing his habeas petition. If this court finds that equitable tolling could apply under the alleged facts of this case, an evidentiary hearing must be held to determine whether there actually is a factual basis for Petitioner's assertion that counsel advised him incorrectly and that counsel's misadvice was the cause of his late filing.

excuse an untimely habeas application); *Murray v. Giarratano*, 492 U.S. 1 (1989) (holding that *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), applies to inmates under sentence of death as well as to other inmates). Thus, if Florida did not provide for the appointment of counsel to Petitioner, he would have no federal claim. As this Court held in *Giarratano*:

> State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal. The additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are, we think, sufficient to assure the reliability of the process by which the death penalty is imposed. We therefore decline to read either the Eighth Amendment or the Due Process Clause to require yet another distinction between the rights of capital case defendants and those in noncapital cases.

492 U.S. at 10; *see also Hill v. Jones*, 81 F.3d 1015, 1025 (11th Cir. 1996) (holding there is no constitutional right to post-conviction counsel in the Eleventh Circuit and that ineffective assistance of post-conviction counsel is not a cognizable claim).

All that is required in post-conviction relief proceedings, whether capital or non-capital, is that the defendant have meaningful access to the judicial process. *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (furnishing access to adequate law libraries or adequate assistance from persons trained in the law may fulfill a State's obligation to provide prisoners' right of access to courts), *disapproved in part by Lewis v. Casey*, 518 U.S. 343 (1996) (*Bounds* disapproved to the extent it can be read to require a state to enable prisoners to discover grievances and litigate effectively once in court; a state need only provide inmates with tools necessary to attack sentences directly or collaterally). Because there is no constitutional right to post-

conviction counsel, Petitioner's argument that he is entitled to equitable tolling because he was not appointed counsel "soon enough" is without merit.

In any event, while Petitioner argues that equitable tolling is warranted because he did not receive appointed counsel early enough in the state post-conviction proceeding process, this appointment is irrelevant as it did not cause Petitioner to file his habeas petition late. The disorganization Petitioner alleges existed within Florida's registry counsel program four years prior to the time Petitioner's habeas petition was due is also irrelevant as it did not cause Petitioner to untimely file his petition. Petitioner's state post-conviction motion was timely filed, and one day remained on the AEDPA limitations clock. Once the Florida Supreme Court issued its opinion affirming the denial of post-conviction relief, Petitioner should have known, through the exercise of due diligence, that the AEDPA limitations clock would begin to run once the Florida Supreme Court issued its mandate.[15] The mandate in this case was not issued until thirty days after the date of the decision. Thus, Petitioner had not one day, but a full thirty-one days to file his habeas petition. Contrary to Petitioner's allegations that timely filing of his habeas petition was "practically impossible," this thirty-one day period was more than ample time for Petitioner to file his habeas petition, particularly given that his petition raised the same claims presented in his state proceedings,[16] and the

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[15] *See Nyland v. Moore*, 216 F.3d 1264, 1267 (11th Cir. 2000) (under Florida law, appellate order "is pending" until the mandate issues).

[16] Although Lawrence's counsel filed an amended habeas petition which raised different claims, an amended habeas petition, does not relate back (and escape AEDPA's one-year time limit) when it asserts a ground for relief supported by facts that differ in both time and type from those set forth in the original pleading. *Mayle*, 125 S. Ct. at 2566. The claims raised in Petitioner's state proceedings are summarized in *Lawrence v. State*, 698 So. 2d 1219, 1221-22 (Fla. 1997); and *Lawrence v. State*, 831 So. 2d 121, 126 (Fla. 2002).

prisoner mailbox rule applies.[17] Had Petitioner exercised due diligence, he could easily have timely filed his habeas petition.

Finally, accepting Petitioner's argument simply punishes states for appointing counsel. Notwithstanding the fact that there is no constitutional right to post-conviction counsel, Florida has taken the extraordinary step of appointing post-conviction counsel and becoming the only state to expressly require state courts to "monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation." § 21.11(12), Fla. Stat.; *see also* Celestine Richards McConville, *Protecting the Right to Effective Assistance of Capital Postconviction Counsel: The Scope of the Constitutional Obligation to Monitor Counsel Performance*, 66 U. Pitt. L. Rev. 521, 526-27 (2005). In addition, Florida requires registry counsel to meet minimum standards of experience and competence and limits their workload to ensure sufficient time is dedicated to each client. § 27.710 and § 27.711(9), Fla. Stats. Petitioner argues that Florida and other states who choose to provide counsel for state post-conviction proceedings and establish minimum standards for counsel should be punished for doing so, as any mistakes made by appointed counsel should be held against the state. Such a result would ensure state reluctance to appoint counsel or establish minimum standards.

Given that attorney negligence does not entitle a litigant to equitable tolling, the sole question that remains is whether an alleged mistake by *state appointed* counsel entitles litigants to equitable tolling. For the reasons stated above it does not. Further, no distinction is drawn between appointed counsel and private counsel in the ineffective assistance of post-conviction counsel context. In either case a litigant bears the risk of his counsel's mistakes and no ineffective assistance claim can be

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[17] Prisoner petitions are deemed filed when they are placed into the prison mail system. *Adams v. United States*, 173 F.3d 1339, 1341 (11th Cir. 1999). Petitioner merely had to place his petition in the prison mail system on November 19, 2002.

raised. Given the lack of distinction between appointed and private counsel in the ineffective assistance of counsel context, there is no reason to distinguish between appointed counsel and private counsel for equitable tolling purposes.

CONCLUSION

Based on all of the foregoing, Respondent respectfully requests that the decision of the Eleventh Circuit be affirmed.

RESPECTFULLY SUBMITTED,

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IN THE

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STATE OF FLORIDA,

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REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

I. There is a split in the circuits about whether the one-year period of limitations is tolled for "[t]he time during which a properly filed application for state postconviction or other collateral review with respect to the pertinent judgment or claim is pending. . . ." Antiterrorism and Effective Death Penalty Act (AEDPA), 28 § 2244(d)(2). Where a defendant facing death has pending a United States Supreme Court certiorari petition to review the validity of the State's denial of his claims for state postconviction relief, does the defendant have an application pending which tolls the § 2244 statute of limitations?

The State opens its Merits Brief with a statement which is subtly skewed and is the first step in a faulty progression to

an erroneous conclusion. "AEDPA is structured to ensure habeas litigants first exhaust state remedies and then promptly file their federal habeas petition." Resp. Br. at 3. Exhaustion is neither new to the AEDPA nor controversial, but wholly beside the point of whether AEDPA should be tolled while a Petitioner—state or individual—seeks certiorari review. Florida next suggests that the § 2244(d)(2) tolling provision operates to facilitate exhaustion by stopping the clock on the AEDPA limitations period "only until state court remedies are exhausted." Resp. Br. at 3; *see also* Resp. Br. at 6. This position is inconsistent with Congress' failure to adopt the initial proposal of exhaustion as the limitations' trigger, and its choice of AEDPA's tolling provisions. But the State never truly grapples with the critical point on which this matter turns—that the language under dispute does not refer to "state court remedies" or to "exhaustion" but to the *pendency* of a particular species of pleading—an *application* for state postconviction relief.

And here is where the State's leap occurs. The State urges that § 2244(d)(2) identifies, defines and requires a specific forum where the applicant's state postconviction pleading must be under review in order to be considered pending. Its logic neatly but erroneously continues: A state motion for postconviction relief terminates at the decision of the Florida Supreme Court, not because further review cannot be had by this Court, but because the postconviction motion is now "exhausted." It continues: if the postconviction motion is "exhausted," then it is no longer "in continuance." If it is not "in continuance," the AEDPA timeclock once again begins to tick. And, although this Court yet has power to review the decision via certiorari, that process is not a "continuance" of the state proceeding, but some other species of federal review. The result of this construction would be that the petitioner, if he wishes to seek this Court's determination of federal constitutional law, must not only file this new, undefined lawsuit but, since the AEDPA clock is unrelated to

the new lawsuit, of necessity proceed with his federal 28 U.S.C. § 2254 motion.

However, because something is "exhausted" does not mean that the state postconviction motion petition is no longer in existence. Proceedings on that petition may continue to this Court if any federal constitutional issues are challenged.

Since the State misperceives "exhaustion" and its purpose, the equation of "exhaustion" and "in continuance" is fallacious. Exhaustion speaks to the minimum requirements which the petitioner must meet before he is *permitted* to seek federal postconviction review under 28 U.S.C. § 2254. Exhaustion may be the key to the federal courthouse, but it is not a declaration that the State proceeding has terminated.

The Petitioner, after decision by the Florida Supreme Court, is not thus left with only two choices: pursue certiorari or file a motion under 28 U.S.C.§ 2254. He may, and frequently will, pursue both,[1] and he has an absolute right to have this Court's determination of federal issues *before* he enters the United States District Courtroom. Although it is settled that "exhaustion does not include seeking certiorari from a state court denial of post conviction relief." *Fay v. Noia*, 372 U.S. 391, 435-38 (1963), being "exhausted" does not define whether the petition is "pending." And, while the certiorari petition is not required for exhaustion purposes, seeking certiorari from a state court denial of postconviction relief is permitted, and, if filed, continues the State application.

There is nothing in the language of the statute as it is written to suggest the conclusion the State struggles to find and can only reach by restating inaccurately the statute's

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[1] Florida's Legislature recognized the routine nature of the pursuit of this Court's review of postconviction determinations when it provided funding to Registry Counsel to file such petitions seeking certiorari. Fla. Stat. Ann. § 27.711(4)(f),(g).

language.[2] The statute refers neither to exhaustion nor divestiture of this Court's appellate function. Nothing in the language of the statute compels the result the State urges. Rather the contrary is true. By suggesting a non-existent relationship between the concepts of tolling and exhaustion and how they might operate together, the State injects into Mr. Lawrence's simple question an element of subtle irrelevancy, skewing the focus away from the issues which should compel our attention.

Mr. Lawrence's position is succinct. The AEDPA tolling provisions require only that a litigant's state postconviction relief application be *pending*—not that it be pending in state court. The statute addresses the proceeding in question – *an application for state relief*—not the court in which that proceeding may be decided. Where a petitioner disputes the state court's interpretation of U.S. Constitutional law by filing a petition for writ of certiorari before this Court, the petitioner's state postconviction motion is indeed pending, regardless that it is no longer pending in state court. However, the State declines to discuss the one question that defines the difference between its reading and that of Mr. Lawrence—what is this Court deciding when it adjudicates a certiorari petition from the denial of a state postconviction application if it is not the state petition?

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[2] At one point the State presents its revised statutory language in quotes, citing erroneously to the statute, "Section 2244(d)(2) only tolls time when '*a state* prisoner is attempting, *through the proper use of state court procedures, to exhaust state court remedies* . . .' 28 U.S.C. § 2244(d)(2)." Resp. Br. at 14 (emphasis added by Respondent). The State is of course not quoting § 2244(d)(2), instead the quote comes from *Rhine v. Boone*, 182 F.3d 1153, 1155 (10th Cir. 1999) (citing *Barnett v. Lemaster*, 167 F.3d 1321, 1323 (10th Cir. 1999)). While this revision doubtless amounts to nothing more than a drafting error, it nonetheless throws into sharp relief the State's consistent inability to squarely face and respond to the statute as it is written.

This Court's power to affect the state court's determination is akin to that of a superior state appellate court over a lower state court:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C.§ 2104. As long as this Court has the power to act upon the state court's judgment in the state postconviction proceeding, that proceeding must be considered to be "pending;" because this Court, in exercising its power of review, can act upon the state court's resolution of the state post-conviction proceedings, those proceedings cannot be said to be complete.

The State quotes liberally from *Carey v. Saffold,* 536 U.S. 214 (2002), in support of its argument that tolling occurs only when the matter is being considered in the state courts. Resp. Br. at 7-8. In particular, the State relies on this Court's statement that the matter is pending "[a]s long as the ordinary state collateral review process is 'in continuance.'" Resp. Br. at 7, quoting *Carey*, 536 U.S. at 219-20. *Carey* cannot be read as the State claims for two reasons. First, in *Carey* this Court was only asked to consider whether, during the gap between the decision by one state court and the request for review of that decision by a higher state court, the original application should be considered "pending;" it held that it should be. *Carey*, 536 U.S. at 219-21. This Court did not purport to resolve the question presented in this case—is the matter still pending when review is sought from this Court. Second, this Court explained that "pending" means while the matter is "in continuance" or "until the completion of" the review process. *Id.* at 219-20. What, then—if anything—

legally undergirds the State's position that this Court's action does not amount to a continuance of the original state court proceeding upon which it operates?

In contrast to Mr. Lawrence's conservative, unremarkable statutory reading, the State urges a novel construction with far-reaching ramifications and inherent practical complications. To accommodate the State's preferred postconviction landscape, this Court would have to create a new federal application, since, according to the State, the application changes its character from a state application for relief to some sort of unspecified federal application.

In addition to its reliance on *Carey,* Florida espouses a dubious characterization of § 2263(b)(2) as a signpost leading us to find "Congress's intent to synchronize the tolling period with the § 2254(b)(1)(a) exhaustion requirement." Resp. Br. at 9. The State's use of § 2263(b)(2) to bolster its position is flawed because it asserts that a statutory drafting *omission*—particular language in one section of a statute that is omitted in another section—is proof of intent to reach a similar result in both sections. The State opines, "While the language used . . . in § 2263(b)(2) is more specific than that in § 2244(d)(2), these sections accomplish the same purpose: tolling the limitations period until state remedies are exhausted as required by § 2254." Resp. Br. at 9-10. Of course, the fact that Congress used different, "more specific" language in § 2263(b) is not evidence that it intended to accomplish the same thing there as it did in § 2244(d)(2). Instead, it is evidence that Congress knew how to limit tolling to proceedings in state court when it wanted to, and therefore should be presumed to know that it was not conveying a desire to impose such a limit in the language selected for § 2244(d)(2). As this Court has reiterated, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in

the disparate inclusion or exclusion." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *Bates v. United States*, 522 U.S. 23, 29-30 (1997)).

The State, in urging the adoption of its ideal scenario, asks the Court to do what Congress did not do—make certiorari application to this Court difficult, if not, in a practical sense, impossible. The State claims, "Certiorari petitions seeking review of state postconviction decisions are simply not an integral part, nor any part, of the state process." Resp. Br. at 3. By this simple statement, the State expresses its desire that a state court's judgment of federal constitutional issues should be substituted for the judgment of this Court. Had Congress intended to limit the power and jurisdiction of this Court in drafting § 2244(d)(2), it would have done what it did elsewhere in the AEDPA. In § 2244(b)(3)(E) Congress expressly divested this Court of appellate jurisdiction, by way of certiorari petition or appeal, over federal appellate court decisions denying leave to file a second federal habeas corpus petition.[3] By declining to use this or similar language in § 2244(d)(2), Congress signaled its intention to leave the status quo undisturbed. *See Duncan*, 533 U.S. at 174. The status quo, for over two hundred years, has been that this Court has the authority and power to review state court determinations of federal constitutional law. *See* U.S. Const. Art. III, §§ 1, 2; Judiciary Act of February 5, 1867, c. 28, § 1, 14 Stat. 385-86; 28 U.S.C. § 1257(c).

As its justification for asking this Court to read the clear statute in light of its policy concerns, the State argues that the plain language reading of the statute:

> (1) Contravenes the AEDPA's mandate to expedite the postconviction process,

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[3] Section 2244(b)(3)(E) provides, "The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be subject to a petition for rehearing or for a writ of certiorari."

(2) "[E]ncourages the filing of frivolous certiorari petitions for the sole purpose of tolling the limitations period," Resp. Br. at 3, *see also* Resp. Br, at 17, and

(3) Could result in a "liberal allowance of habeas," a result that "diminishes the significance of state trial court proceedings," and "erodes the quality of state court judging and the morale of state judiciaries," Resp. Br. at 13.

But unless this Court first finds that the statute is unclear, these policy arguments do not come into play. This would mean accepting the premises of Florida's construction argument—which is, in short, that this Court's certiorari review is not a continuation of the state court action but instead a new federal cause of action—unheard of until now. Nonetheless, we will briefly address and rebut each of Florida's complaints.

1. Expeditiousness

How important is speedy resolution of this death case to the State of Florida? Florida itself caused significant delay in Mr. Lawrence's case in two ways—the tardy assignment of counsel, discussed more fully below, and the failure to dismiss an interlocutory appeal in a timely fashion. On April 12, 2004, the district court entered an order staying the proceedings, noting a circuit split on the timeliness issue. Eleventh Circuit precedent notwithstanding, the district court elected to await the resolution of the then-pending certiorari petition in *Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003); the Sixth Circuit's holding in *Abela* was contrary to the Eleventh Circuit's decision on this question in *Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000). The district court resolved that if this Court denied review in *Abela*, it would dismiss Mr. Lawrence's petition based on *Coates*. About six weeks later, on May 24, 2004, this Court denied review in *Caruso v. Abela*, 541 U.S. 1070, 124 S. Ct. 2388 (2004). Although aware of the denial, the district court could not enter an order dismissing the petition because Florida had lodged its inter-

locutory appeal from the district court's stay order challenging that court's authority to issue a stay. Even after the denial of certiorari in *Abela*, Florida declined to voluntarily dismiss its appeal and the matter lingered on the Eleventh Circuit's docket.[4] Meanwhile, as a consequence, the matter hung unresolved on the District Court docket for 115 days after this Court denied review in *Abela*; the District Court finally entered its order dismissing the petition on September 16, 2004. J.A. 10. This policy concern must be read in the context of the State's actions.

It is true that reading the statute to toll during this Court's review may lengthen the postconviction process on one hand, but if certiorari is granted this Court may address well established as well as newly urged Constitutional issues at a much earlier time and under a different standard. These additional days to apply for certiorari and to receive a ruling thereon do not subvert the AEDPA's essential objectives.

The delay concerns underlying the AEDPA were with much longer periods of time—"from 1973 to 1995 the average time from death sentence to execution was close to ten years and rising." James S. Liebman, *Opting for Real Death Penalty Reform*, 3 Ohio S. L. Rev. 315, 318 (2000). The extension of the process involved here is a comparatively short, discrete, time period—the 90 days permitted for filing a petition for writ of certiorari and the time it takes for this Court to determine whether to grant review. Viewed through a long lens of reality, the question of damage to the State or the integrity of the AEDPA's objectives from reading the statute to allow time for this Court's review of important federal con-

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[4] The State's initial brief in the interlocutory appeal was filed after this Court had denied certiorari in *Abela*. Nonetheless, the State persisted with its appeal, opposing Mr. Lawrence's Motion to Strike its brief. Finally, on September 2, 2004, the Eleventh Circuit dismissed the State's interlocutory appeal.

stitutional issues is a patently irrelevant topic that diverts attention from the real issue.

2. Frivolous Certiorari Petitions[5]

The State's second reason for opposing Mr. Lawrence's interpretation of § 2244(d)(2) is the specter of frivolous certiorari petitions. First, the State's complaint in this regard operates as a plain admission that, without tolling, filing a petition for certiorari will be considerably harder as a practical matter for most litigants. In this case, the difficulties are obvious. After filing his state postconviction petition, Mr. Lawrence had whatever remained of his original 365 days—those days that had not been used to file his state pleading—to obtain counsel and records, investigate, interview witnesses, research, draft and properly file a substantive petition for federal relief. In this case, the time remaining was a single day. In large part this is because Florida's delay in appointing state postconviction counsel and providing him records siphoned off all but the last 10% of Mr. Lawrence's time for preparation and filing. After counsel and records were in place he was left with 37 out of his 365 days.

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[5] The State does not address the situation which occurred in this very case—more restrictive applications of the Constitution under the AEDPA. On certiorari review from the postconviction denial, the petitioner may bring, and this Court may entertain, a broad range of Constitutional violations and, should it deem it appropriate, find that the facts in a particular case establish a violation never before recognized or requiring clarification or extension of existing precedent. The State would have the petitioner begin the § 2254 process immediately. At that stage the petitioner could not argue for new law or newly recognized application of the law to the facts. *See* Diane Courselle, *AEDPA Statute of Limitations: Is It Tolled When the United States Supreme Court is Asked to Review a Judgment From a State Post-Conviction Proceeding?* 53 Cleve. St. L. Rev. 585, 593-95 (2005-06).

3. Deference to state court determinations of the federal constitution.

Third on the list of the State's reasons for opposition is the possibility of a "liberal allowance of habeas," that "diminishes the significance of state trial court proceedings" and "erodes the quality of state court judging and the morale of state judiciaries." Resp. Br. at 13. First, there could never be a liberal allowance of habeas relief without a liberal amount of systemic error in the prosecution and imposition of death sentences. Questions of relief from error and error itself cannot be separated—relief is not possible without error.

In 1991, the Chair of the U.S. Senate Committee on the Judiciary asked Professor James Liebman of the Columbia University School of Law to calculate the frequency of relief in habeas corpus cases. In late 1995, the study was expanded from a simple count of cases and their outcomes to a search for information that might help explain why relief is granted in so many capital cases. *See* James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973-1995* at http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf (June 2000). Writing later, on his own, Professor Liebman reached this conclusion:

> Statistical analysis showing a positive relationship between how frequently a jurisdiction imposes the death penalty for every one hundred homicides and the likelihood that any resulting death verdict will be tainted by serious error, as well as developing literature on the causes of miscarriages and mistakes in particular cases, suggest that following causal explanation: ***At great risk to both reliability and efficiency, and apparently more so than in other parts of the criminal justice system, capital trial and appellate procedures and incentives***

reward the imposition of death verdicts based on factors other than evidence and the law.

Liebman, *Opting for Real Death Penalty Reform*, 3 Ohio S. L. Rev. at 321 (emphasis added) (citing as an example, John Blume & Theodore Eisenberg, *Judicial Policies, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. Cal. L. Rev. 465, 469 (1999) ("The [per-murder] rate at which states impose [death] sentences strongly correlates with the rate at which [post-sentence] relief was obtained from those sentences.")). Because this suggests that factors such as emotion or community concerns will impact on the imposition of the death sentence, Florida judges doing justice should welcome review of their application of the federal constitution.

The State, in both the tone and substance of its arguments, urges this Court to consider a state court judge's stake in being "right" as a counterbalance to this defendant's desire for a federal review of his claims that may reveal the constitutional error standing between life and execution. How can these interests be equal? Indeed, what interest does any legal actor have that exceeds the duty to the integrity of the result and to the judicial system?

Both the State's failure to address core questions—what is the petition for certiorari if it is not a continuation of the state postconviction proceeding—and its limited comparison of *relevant* statutory provisions—demonstrate the fatal flaws of its position. These failures, along with the arguments set out in Petitioner's initial brief and herein require that relief must be granted.

II. Equity is available to toll the AEDPA statute of limitations when extraordinary circumstances beyond the Petitioner's control exist. Here, there was patent confusion about the calculation of AEDPA's statute of limitations as evidenced by a circuit split; the Florida capital representation system was acknowledged by the Florida Supreme Court to be non-functioning; and, the counsel assignment system failed to assign Mr. Lawrence counsel until virtually all of his limitations' period had expired. These failures occurred in the context of a newly implemented Registry Counsel system designed to solve the counsel crisis, and which included a Legislative promise that Registry Counsel would be competent, would file appropriate motions in a timely fashion, and that counsel's representation would be monitored by Florida. Are these factors sufficient to equitably toll the time for Mr. Lawrence to file his petition?

Although Mr. Lawrence believes that a reasoned reading of § 2244(d)(2) yields the conclusion that his petition is timely, the diverse readings of this section by courts, commentators and litigants are evidence that confusion exists. The good faith reading by Mr. Lawrence's counsel, should it prove to be erroneous, particularly when coupled with Mr. Lawrence's reliance on Florida's promise that it would ensure that he was provided with competent counsel, is the type of extraordinary circumstance which must equitably excuse any limitations' error.

This Court is not being asked to break new ground in the field of equity, merely to consider the rare constellation of factors present which require application of equity. The State does not assist in this analysis. It does not confront the shocking state of Florida's Capital system, the squandering of 90% of Mr. Lawrence's 365 available days while the system struggled to appoint counsel and provide him with records,

the significance of the Florida statutory mandate to assign and monitor Registry counsel, or the limited intelligence level of Mr. Lawrence. It avoids these issues individually, and ignores their collective impact. In equity, the sum is truly worth more than the parts.

The State was incorrect in its assertion that this disorganization in the Florida courts at the time that the Registry was being established did not affect Mr. Lawrence because those problems occurred four years previously. *See* Resp. Br. at 27. The disarray of the state postconviction process, rather than being a stale event occurring four years prior, involved Mr. Lawrence directly. He was found by the Florida Supreme Court to be one of the individuals whose representation was so impacted by the extraordinary delays due to this very disarray, that the time for filing his state postconviction motion was extended. *Amendments to Florida Rules of Criminal Procedure–Capital Postconviction Public Records Production (Time Tolling). In Re Rule of Criminal Procedure 3.851 (Collateral Relief After Death Sentence Has Been Imposed) And Rule 3.850 (Motion to Vacate, Set Aside, or Correct Sentence)*, 719 So.2d 869, App. B (Fla 1998) ("We toll the time requirements of those rules until October 1, 1998, for all of those defendants set forth in appendix B.").

Mr. Lawrence was keenly affected by the failure of the Florida system to provide him counsel or to expedite the provision of records. Mr. Lawrence, in spite of Florida's promise to timely appoint competent postconviction counsel, *see* Fla. Stat. Ann. §§ 27.710, 27.711(12), failed to receive working counsel until 298 days had run of his limitations' period and that counsel had to wait another 30 days for production of records by the State. This is how the unthinkable delay occurred. Two hundred and two days expired before the trial court appointed the first counsel, hence that gentleman had only 163 days in which to prepare and file the motion. However, 21 days later, he moved to withdraw and a

second counsel was appointed. One hundred forty-two days remained for second counsel before the limitations' period expired. Second counsel accepted the appointment, conditioned upon reaching an agreeable accord with the State regarding payment. Sixty-six days later, a satisfactory contract not being reached, second counsel was permitted to withdraw, and third counsel was appointed. At that point, there were 76 days left in the limitations period. Even after a third counsel was chosen from the state Registry, the production of files and records maintained by various State actors was not expedited. As of January 4, 1999, counsel acknowledged that he had received some records on December 14, 1998, but counsel was still forced to litigate the failure to produce certain other records. By December 14, 1998, when a mere 37 days of these limitations periods remained, counsel had only received some of the tools necessary to prepare the state postconviction petition.[6]

Mr. Lawrence's state postconviction motion was filed 36 days later, after partial records' production—on the 364th day of the limitations periods. This debacle in assigning counsel and the resultant compressed time frame for research, investigation and drafting of a state petition, had a domino effect on the timely filing of a subsequent federal motion. These facts require equitable intervention.

Mr. Lawrence had only 10% of the time that Congress intended for investigation, legal research and drafting of a state motion. Congress permitted 365 days against the presumed backdrop of counsel beginning work on day one. Instead, despite Florida's promise to timely appoint counsel, Mr. Lawrence was left with 37 days. Without ever addressing how its own actions (and inaction) affect the

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[6] Even after the petition was filed, and as late as February, 1999, Mr. Lawrence continued to litigate records' production issues and receive additional records from the State.

equities, the consequence that the State urges is stark indeed: the door to the federal courthouse is forever closed to Mr. Lawrence.

Not only were Florida's delays in the assignment of counsel and the provision of documents egregious, the impact on Mr. Lawrence was multiplied by the malfunctioning of Florida's Registry. Unique to Florida's statutory plan is its promise to death row inmates that the State will promptly appoint competent counsel and follow those appointments by monitoring appointed counsel's actions. *See* Fla. Stat. Ann. §§ 27.710, 27.711(12). In its presentation before this Court the State treats this explicit statutory promise as surplusage. It fails to explain what monitoring means, how it functions, why it was not evident in Mr. Lawrence's case or why, conversely, Florida should be excused from its promise.

Rather than addressing these issues of incalculable importance, the State, citing decisions which do not raise this State "promise" issue, characterizes Mr. Lawrence's failure to file his federal motion while this Court was considering his certiorari petition as "ignorance," because, *inter alia*, the law was "well settled." Resp. Br. at 19. The State also argues that attorney error is not support for equitable excuse because an attorney is an agent for the client, *see* Resp. Br. at 23-25, and that since there is no constitutional right to postconviction counsel, the actions of the counsel are immune from inquiry, *see* Resp. Br. at 25. None of the State's arguments address Mr. Lawrence's unique factual posture.

The State asserts that there is no proof that Mr. Lawrence relied upon counsel's error regarding the AEDPA limitations' tolling calculations in the Eleventh Circuit. *See* Resp. Br. at 25, n.14. The face of the Record reveals that Mr. Lawrence was given incorrect advice and relied upon that advice to his detriment. The typewritten Motion to Vacate presented to the United States District Court establishes that both Mr. Lawrence and his counsel were calculating the time for his

federal § 2254 filing based upon the time when this Court made a decision on his certiorari petition. He relied on counsel not only for advice but even to prepare the typewritten document. In response to Question 13 on the form provided by the District Court for filing of a Motion to Vacate under Title 28 U.S.C. § 2254, Mr. Lawrence answered in the affirmative, indicating that he had filed an "other federal pleading regarding the validity of your state court confinement, in any federal court?" He explained this answer:

> U.S. SUPREME COURT CERTIORARI, INFO PENDING.
>
> Petitioner has a pending Petition for Writ of Certiorari in the U.S. Supreme Court. It has been calculated that his time for filing federal habeas corpus would expire one day after denial of certiorari. Thus, he would have insufficient time to file for federal habeas corpus. Petitioner requests ruling herein be deferred until such time as a U.S. Certiorar [sic] is determined.

J.A. 29-30. Mr. Lawrence relied on a State actor who mis-advised him.

In this case, the State argues that relief from this error has no place in equity and, consequently, that Mr. Lawrence should suffer the consequences. However, the State did not hesitate to advocate that such error *should be excused* when it was a Florida Assistant Attorney general who made the identical error and the worst case scenario to the State would have been litigating the merits of another petitioner's claim, not death. *See Day v. McDonough*, 126 S. Ct. 1675 (2006). Although *Day* was decided on the issue of whether a United States District Court could *sua sponte* notice a timeliness error, the State argued, alternatively, that its mistake should be excused. The State did not there characterize its alternative argument as "equitable," yet it effectively was relieved from its error.

In this case, the State characterizes the mistake as "ignorance of the law," and asserts that the patent state of the law establishes the egregiousness of the error. Yet, when addressing what it considered a reasonable accommodation to the State's identical error, made in the identical time frame, the State argued for excuse.[7]

Mr. Lawrence wants no more nor less than the State proposed in *Day* as a workable rule.

> In lieu of an inflexible rule requiring dismissal whenever AEDPA's one-year clock has run, or, at the opposite extreme, a rule treating the State's failure initially to plead the one-year bar as an absolute waiver, the State reads the statutes, Rules, and decisions in point to permit the "exercise [of] discretion in each case to decide whether the administration of justice is better served by dismissing the case on statute of limitations grounds or by reaching the merits of the petition." . . . Employing that 'intermediary approach' in this particular case [*Day*], the State argues, the petition should not be deemed timely simply because a government attorney calculated the days in between petitions incorrectly.

Day, 126 S. Ct. at 1683. Of course, even the characterization as a "calculation" error was misleading. It was not the State's counsel's arithmetic which was erroneous, the error was the application of the law.[8] Nonetheless, the State argues that, to

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[7] The State argued not only the power of the court issue but also that its assertion that Day's petition was timely, which the Magistrate Judge characterized as patently erroneous, should be excused. *Id.* at 1683. The Assistant Attorney General in *Day* excepted from the limitations period the time when this Court was considering certiorari from denial of postconviction relief, and admitted on the face of the pleadings that Day's petition was timely. *Day*, 126 S. Ct. at 1681.

[8] This Court's decision in *Day*, however, does not undermine Mr. Lawrence's statutory construction argument in Issue I, *supra*. This Court made clear in *Day* that it was not deciding whether the State's interpretation of the tolling provision – that tolling continues while this

the extent that equity might apply to the AEDPA, Mr. Lawrence's equitable concerns are insufficient. *See* Resp. Br. at 20.

Mistakes happen. Some of these mistakes result in consequences and others do not. In *Day*, although the facts were identical, the State argued alternative outcomes, the result of each favorable to it. The State's position on error should be accepted by the Court. Mr. Lawrence's consequence for making the same mistake for which the State's counsel was excused should not be a bar to his petition for relief.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Eleventh Circuit Court of Appeals.

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Court considers a certiorari petition from a state postconviction proceeding—was actually erroneous. *See Day*, 126 S. Ct. at 1680 n.2 ("The instant opinion, we emphasize, addresses only the authority of the District Court to raise AEDPA's time bar, not the correctness of its decision that the limitations period had run.").

(2)

No. 05-8820

IN THE

Supreme Court of the United States

GARY LAWRENCE,

Petitioner,

—v.—

FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF FLORIDA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Florida is one of its statewide affiliates. *Amici* respectfully submit this brief to assist the Court in resolving a fundamental issue of equity under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA): Can the state represent to death-row inmates that it will provide them with "quality" counsel in postconviction proceedings, and then argue that their federal habeas petitions should be dismissed because appointed counsel missed a crucial filing deadline? Given its longstanding interest in fair and meaningful access to the courts, the proper resolution of that question is a matter of substantial importance to the ACLU and its members.

STATEMENT OF THE CASE

In March 1995, petitioner Gary Lawrence was convicted of premeditated murder in the first degree and conspiracy to commit murder, and sentenced to death. *See Lawrence v. Florida*, 421 F.3d 1221, 1222 (11th Cir. 2005). On August 28, 1997, the Florida Supreme Court affirmed his convictions and death sentence. *See Lawrence v. State*, 698 So.2d 1219 (Fla. 1997). This Court denied *certiorari* on January 20, 1998, concluding direct review of Lawrence's

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[1] Pursuant to Rule 37.3, letters of consent to the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part and no person other than *amici curiae*, their members or their counsel made a monetary contribution to this brief.

conviction. *Lawrence v. Florida*, 522 U.S. 1080 (1998).[2]

Although Florida law requires its supreme court to appoint postconviction counsel when the court issues its "mandate affirming a judgment and sentence of death," Fl. R. Crim. P. 3.851, Gary Lawrence was not appointed counsel until August 10, 1998, *see* Case Information/Progress Docket – Santa Rosa, Florida (Case #94000397CFMA), close to seven months after his conviction had become final and more than ten months after the Florida Supreme Court had issued its mandate. *See Lawrence v. State*, No. SC60-85725, Docket Entry of Oct. 2, 1997 (Fla.) (available at http://www.floridasupremecourt.org/). Appointed counsel moved to withdraw on August 31, 1998. Case Information/Progress Docket – Santa Rosa, Florida (Case #94000397CFMA). Lawrence did not receive counsel who took an active role in representing him until November 5, 1998, when the motion to withdraw was granted and counsel from Florida's statutory "registry" system was appointed. *Id.*; *see* FLA. STAT. ANN. §§ 27.701(2); 27.710.

During this period, Florida was in the beginning stages of implementing a new system of providing capital postconviction representation to some death-row inmates through a "registry" of private attorneys. *See generally In re Rules of Criminal Procedure 3.851 & 3.850*, 719 So. 2d 869, 870 (1998). As a result of the chaos created by this transition, in 1998 the Florida Supreme Court took the extraordinary step of tolling the statute of limitations for

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[2] AEDPA's one-year statute of limitations for federal habeas petitions runs from the "conclusion of direct review" of the state court judgment, including the time for filing for *certiorari* or the time necessary for the *certiorari* petition to be resolved. 28 U.S.C. § 2244(d)(1)(A). Thus, Lawrence's one-year limitations period under AEDPA began to run on January 20, 1998. The conclusion of direct review also triggered Florida's one-year statute of limitations for seeking state postconviction relief. *See* Fla. R. Crim. P. 3.851.

state postconviction motions filed on behalf of Lawrence and other death-row inmates who were likely to be appointed registry attorneys. 719 So.2d at 870 & app. B.

When registry counsel was appointed on November 5, 1998, only 67 days remained for Lawrence to file either a state postconviction motion which would have tolled AEDPA's statute of limitations or a federal habeas petition.[3] Counsel filed Lawrence's motion for state postconviction relief on January 19, 1999, with only one day remaining on AEDPA's clock. This motion remained pending in the Florida courts until November 18, 2002, when the Florida Supreme Court affirmed the trial court's denial of state postconviction relief, *Lawrence v. State*, 831 So.2d 121 (Fla. 2002), and issued its mandate. *See Lawrence v. State*, No. SC01-674, Docket Entry of Nov. 18, 2002 (Fla.) (available at http://www.floridasupremecourt.org/).

Under the current law in the Eleventh Circuit, Lawrence had one day from November 18, 2002, to file a petition for federal habeas corpus. *See Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000) ("[T]he time during which a petition for writ of *certiorari* is pending, or could be filed, following the denial of collateral relief in state courts, is not to be subtracted from the running of time for 28 U.S.C. § 2244(d)(1) statute of limitations purposes."). But instead of filing a petition for habeas corpus on November 19, 2002, Lawrence's registry attorney filed a petition for *certiorari* in this Court on January 9, 2003. Court-appointed and court-monitored,[4] registry counsel pursued this course because he was under the mistaken belief that the limitations period

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[3] AEDPA's one-year limitations period is tolled during the pendency of "a properly filed application for State post-conviction or other collateral review." 28 U.S.C. § 2244(d)(2).

[4] Florida law requires that its courts "*shall* monitor the performance of assigned [registry] counsel to ensure that the capital defendant is receiving quality representation." FLA. STAT. ANN. § 27.711(12) (emphasis added).

would remain tolled until after this Court's *certiorari* review of the denial of state postconviction relief.[5]

This Court denied Lawrence's petition for a writ of *certiorari* on March 24, 2003. Meanwhile, on March 11, 2003, Lawrence filed a *pro se* petition for a writ of habeas corpus in the United States District Court for the Northern District of Florida. The district court ultimately barred the petition as untimely under AEDPA because more than one year had elapsed since the state supreme court's denial of postconviction relief; it also declined to apply equitable tolling. *See* Decision and Order, No. 03 Civ. 97 (N.D. Fl. May 27, 2004). The Eleventh Circuit affirmed. *Lawrence v. Florida*, 421 F.3d 1221 (11th Cir. 2005). On March 27, 2006, this Court granted Lawrence's current petition for a writ of *certiorari*. *Lawrence v. Florida*, __ U.S. __, 126 S.Ct. 1625 (2006).

SUMMARY OF ARGUMENT

This case can and should be resolved in the petitioner's favor by holding that AEDPA's one-year limitations period is tolled pending this Court's decision on a timely petition for *certiorari* from the denial of state postconviction relief. Even if the Court disagrees with that

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[5] Counsel was mistaken in the sense that the Eleventh Circuit had previously ruled otherwise, as noted above. The Sixth Circuit has reached the opposite conclusion. *See, e.g., Abela v. Martin*, 348 F.3d 164, 170 (6th Cir. 2003) ("[I]f there is a *certiorari* petition pending to review the validity of the state's denial of such an application for state post-conviction review, the application is still pending . . ." and the AEDPA's statute of limitations is tolled under 28 U.S.C. § 2244(d)(2)) (quotations omitted)). The resolution of that conflict is one of the questions now before the Court. Although *amici* do not address that question in this brief, *see* n.6 *infra*, we agree with petitioner that the Sixth Circuit's view of the law is correct and the AEDPA's limitations period should be tolled when a petition for *certiorari* is pending from the denial of state postconviction review.

conclusion, however, Lawrence's habeas petition was improperly dismissed. AEDPA's filing deadline is subject to equitable tolling, and equitable tolling is appropriate on the facts of this case.[6]

Florida has established a system to provide legal representation for death-row inmates in state postconviction proceedings that heavily relies on the appointment of private attorneys from a state-created registry. *See* FLA. STAT. ANN. § 27.701(2); FLA. STAT. ANN. § 27.710. Registry attorneys are required by statute to continue representing their clients through federal habeas review. FLA. STAT. ANN. § 27.711 (1) (c). Florida's system of registry counsel requires its courts to "monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation," including the "fil[ing] of appropriate motions in a timely manner." FLA. STAT. ANN. § 27.711(12).

Numerous courts have held that habeas petitioners are entitled to equitable tolling when their filings are late due to reliance on inaccurate representations or unfair actions by the courts or a state. *Amici* submit that equitable tolling should similarly be available where as here, and in a profoundly troubling number of other Florida cases: 1) the cause of a petitioner's late habeas filing is the extraordinary circumstance of his detrimental reliance on Florida's representation that its courts will monitor state-selected counsel to ensure they are providing "quality representation," including filing appropriate pleadings in a timely manner; and 2) the petitioner neither has engaged in dilatory tactics nor had reason to believe that counsel would fail to meet AEDPA's statute of limitations.

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[6] This brief addresses only the issues raised by the third Question Presented in the petition for *certiorari*. *Amici* also support petitioner's position on Questions 1 and 2, although we have not separately briefed them.

ARGUMENT

A PETITIONER'S DETRIMENTAL RELIANCE ON FLORIDA'S REPRESENTATION THAT ITS COURTS WILL MONITOR THE PERFORMANCE OF HIS REGISTRY ATTORNEY TO ENSURE "QUALITY REPRESENTATION," INCLUDING THE FILING OF "APPROPRIATE MOTIONS IN A TIMELY MANNER," IS AN EXTRAORDINARY CIRCUMSTANCE WARRANTING APPLICATION OF EQUITABLE TOLLING.

Florida has established a registry of attorneys to provide legal representation for many death-row inmates in state postconviction proceedings. *See* FLA. STAT. ANN. § 27.701(2); FLA. STAT. ANN. § 27.710.[7] In creating that system, Florida has expressly pledged to death-row inmates, like Lawrence, that the state courts will "monitor the performance of assigned counsel to ensure that the capital

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[7] Until 1998, almost all non-conflict capital cases in Florida were handled by three regional (northern, southern, and middle) offices of "capital collateral counsel." FLA. STAT. ANN. § 27.701(1). In 1998, Florida enacted legislation creating a "'registry' of attorneys in private practice who are available to be appointed to represent defendants in postconviction capital collateral proceedings." 1998 Fla. Laws ch. 98-197, § 3 (creating section 27.710 of the Florida Statutes). This 1998 law, and its 2000 amendment, effectively channeled some of the cases that had previously been handled by capital collateral counsel to private attorneys listed on the "registry." *See* FLA. STAT. ANN. § 27.710(5); 2000 Fla. Laws ch. 2000-3, § 11 (amending FLA. STAT. ANN. § 27.710(5), as originally set forth in 1998 Fla. Laws ch. 98-197, § 3). In 2003, Florida enacted further legislation eliminating the office of capital collateral counsel for the northern region of the state and, in a pilot program, expanding the registry system to handle cases arising in that region. *See* 2003 Fla. Laws ch. 2003-399, § 84 (creating FLA. STAT. ANN. § 27.701(2)).

defendant is receiving quality representation," including the "fil[ing] of appropriate motions in a timely manner." FLA. STAT. ANN. § 27.711(12). [8] Despite that assurance, Florida has repeatedly and often successfully moved to dismiss habeas petitions filed by registry counsel as untimely under AEDPA to the obvious detriment of death-row inmates who are then foreclosed from ever seeking federal habeas review.

As demonstrated below, equitable principles of basic fairness demand the application of equitable tolling where as here, and in a profoundly troubling number of other Florida cases:

1) the cause of a petitioner's late habeas filing is the extraordinary circumstance of his detrimental reliance on Florida's representation that the state courts will monitor state-selected counsel to ensure they are providing "quality representation," including filing appropriate pleadings in a timely manner; and
2) the petitioner has neither engaged in dilatory tactics nor had reason to believe counsel would fail to meet AEDPA's deadline.

[8] Florida's provision of postconviction counsel to capitally-sentenced prisoners includes representation in "one series of collateral litigation of an affirmed conviction and sentence of death, including the proceedings in the trial court that imposed the capital sentence, any appellate review of the sentence by the Supreme Court, any *certiorari* review of the sentence by the United States Supreme Court, and any authorized federal habeas *corpus* litigation with respect to the sentence." FLA. STAT. ANN. § 27.711 (1) (c).

A. Detrimental Reliance On Florida's Pledge That Its State Courts Will Ensure That Registry Counsel Is Providing Quality Representation, Including The Timely Filing Of Motions, Is An Extraordinary Circumstance Warranting Equitable Tolling.

Equitable tolling of the AEDPA's statute of limitations for filing a federal habeas corpus petition set forth in 28 U.S.C. § 2244(d)(1) is appropriate where: (1) the petitioner has been prevented from asserting his rights in some extraordinary way, and (2) the petitioner has exercised reasonable diligence. *See, e.g., Merritt v. Blaine*, 326 F.3d 157, 168 (3d Cir. 2003); *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999) (*per curiam*) (explaining that AEDPA's statute of limitations can be equitably tolled where a petitioner "untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence"); *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000).

This Court has recognized that equitable tolling of AEDPA's statute of limitations can be appropriate when the cause of the late filing is a petitioner's detrimental reliance on representations by either the courts or a state. *See, e.g., Pliler v. Ford*, 542 U.S. 225, 234 (2004) (remanding to 9th Circuit to consider whether "Court of Appeals' concern that respondent had been affirmatively misled" by magistrate judge provides justification for equitable tolling of statute of limitations); *id.* at 235 (O'Connor, J., concurring) ("if the petitioner is affirmatively misled . . . by the court or the State . . . , equitable tolling might well be appropriate" and "[t]his is a question for the Ninth Circuit to consider on remand"); *id.* (Stevens, J., concurring in the judgment) (endorsing majority's approach of "remanding to the Ninth Circuit to determine the propriety of equitable tolling"); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (suggesting that detrimental reliance constituted an extraordinary

circumstance warranting equitable tolling, but ultimately declining to decide petitioner's contention that "state law and Third Circuit exhaustion law created a trap on which [he] detrimentally relied as his federal time limit slipped away" because petitioner was far from diligent in pursuing his claims).

Similarly, the federal courts of appeals have held that equitable tolling can be appropriate when petitioners reasonably rely to their detriment on representations or actions of the courts,[9] the prosecution,[10] court personnel,[11]

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[9] *See Keenan v. Bagley*, 400 F.3d 417, 421 (6th Cir. 2005) (remanding for determination whether petitioner "reasonably viewed the Ohio Supreme Court's order [which was issued after expiration of state court limitations period and which stayed petitioner's execution and afforded six months in which to file for state postconviction relief] as granting him extra time to properly file a petition for state postconviction relief . . . [and] [reasonably] assumed that any time spent pursuing this avenue would toll his federal statute of limitations"); *Griffin v. Rogers*, 399 F.3d 626, 635-38 (6th Cir. 2005) (finding that petitioner, whose mixed petition was dismissed for lack of "total exhaustion" and who relied on federal court's assurance that federal review could be sought after return to state court, was entitled to equitable tolling even though petitioner did not file state-court petition until half a year later, given that petitioner "had no reason to know that she was required to file within 30 days of her dismissal from federal court" and, "[i]n the absence of any known deadline, six months for preparation and filing by a busy public defender's office is not unreasonable").

[10] *See King v. Bell*, 378 F.3d 550, 553, 554 (6th Cir. 2004) (granting equitable tolling because "government's failure to produce the *voir dire* transcripts prevented [petitioner] from complying with the court's original scheduling order").

[11] *See Burger v. Scott*, 317 F.3d 1133, 1143 (10th Cir. 2003) (granting equitable tolling for four-month period between prisoner's deposit of state postconviction petition in prison mail and date on which documents were stamped "filed" by state court because "substantial circumstantial evidence" suggested that "court was in possession of the petition during the entire four-month period," notwithstanding its delay in affixing file stamp to documents); *Knight v. Schofield*, 292 F.3d 709, 709-10 (11th Cir. 2002) (*per curiam*) (granting equitable tolling for prisoner, who was assured by "Georgia Supreme Court clerk . . . that he would be notified

prison personnel,[12] or unclear law.[13] In the extraordinary circumstance where such reliance results in a petitioner missing a filing deadline, equitable tolling protects against the unduly harsh and unfair result of the petitioner losing the right to pursue potentially meritorious claims.

Just as petitioners are entitled to equitable tolling when their filings are late due to reliance on inaccurate representations or unfair actions by the courts or a state, so too are they entitled to equitable tolling when they detrimentally rely on a state's representation that it will provide them quality counsel, including the timely filing of pleadings, and their state-selected, state-monitored counsel fail to meet AEDPA's time bar. *Amici* recognize that litigants ordinarily bear the risk of the mistakes made by their counsel. *See, e.g., Rouse v. Lee*, 339 F.3d 238, 249 (4th Cir. 2003) (relying on agency principles to deny equitable tolling to petitioner whose postconviction counsel violated

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as soon as a decision was made," but in fact was belatedly informed of decision because clerk "inadvertently sent notice of the decision to the wrong person," until "the day he received [actual] notice of the final denial of the Georgia Supreme Court"); *Corjasso v. Ayers*, 278 F.3d 874, 878-80 (9th Cir. 2002) (granting equitable tolling for delay caused by mishandling of *pro se* papers by district court clerk's office).

[12] *See Stillman v. LaMarque*, 319 F.3d 1199, 1202-03 (9th Cir. 2003) (granting equitable tolling because "prison litigation coordinator promised Stillman's lawyer to obtain Stillman's signature in time for filing, but then broke his promise, causing the filing to be late").

[13] *See Banks v. Horn*, 271 F.3d 527, 534 (3d Cir. 2001) (precluding tolling for "properly-filed" state postconviction motion under 28 U.S.C. § 2244(d)(2), but granting equitable tolling to petitioner whose second application for state postconviction relief had been barred as untimely because "the state of the Pennsylvania law regarding the nature of the filing requirement was unclear, and [petitioner] could reasonably have viewed the state time limit as a mere statute of limitations subject to equitable tolling, not, as the Pennsylvania Supreme Court later held [in petitioner's own case], a jurisdictional requirement"), *rev'd on other grounds*, 536 U.S. 266 (2002).

AEDPA's time bar). But the rationale for this assignment of risk cannot reasonably be applied where (a) *state* and its *courts – not the petitioner* – have chosen the lawyer and have assured the petitioner that the courts will ensure quality representation, including the timely filing of motions, and (b) where the petitioner detrimentally relies on this assurance and then merely seeks equitable tolling of a federal statute of limitations that counsel has missed.

To its credit, Florida itself has formally acknowledged that problems arising from the appointment of registry counsel to represent capitally-sentenced defendants in postconviction proceedings may require equitable tolling, at least in some circumstances. Thus, in *In re Rules of Criminal Procedure 3.851 & 3.850*, 719 So.2d 869, app. B (Fla. 1998), the Florida Supreme Court tolled the state's own one year deadline for filing state postconviction motions for a specified list of capital defendants, including Lawrence, who were eligible for the appointment of registry counsel under the then newly-enacted law. *Id.* at 871 (tolling statute of limitations set forth in Fla. R. Crim. P. 3.851(d)(1)). Absent equitable tolling, numerous capitally-sentenced defendants would have lost their right to pursue state postconviction remedies through no fault of their own during this transition period. As the state supreme court explained, "the registry of attorneys will have to be established before trial courts can appoint private counsel as required by the legislation and [] a large number of attorneys will need to be included in the registry because of the many capital postconviction defendants that may fall within the categories under which private counsel will have to be appointed." *Id.* at 870.

The Florida Supreme Court had no power, of course, to toll AEDPA's statute of limitations. That is up to the federal courts. There is no reason, however, why the principle of equitable tolling should depend on whether the state's failure to ensure the timely filing of postconviction

pleadings, as promised, is the result of problems occurring at the inception of the registry counsel program or at later stages of its implementation.

The record in *Damren v. Crosby*, No. 03 Civ. 0039 (M.D. Fla.), vividly illustrates the problem. In the process of reassigning cases to registry counsel, the Florida courts did not assign Damren registry counsel until October 12, 1998, nine months after his conviction had become final. *See* Docket No. 60 at 2, 4. Unfortunately for Damren, the Florida Supreme Court's order did not, and obviously could not, toll AEDPA's statute of limitations. Under the AEDPA, registry counsel had approximately two months remaining to file a federal habeas petition after Damren's state postconviction challenges concluded in 2003, and counsel missed the deadline.

To be sure, a party seeking equitable tolling must act diligently and reasonably to preserve his rights. *Pace*, 544 U.S. at 418 & n.8. But reliance on registry counsel who is allegedly being monitored by the state to ensure quality representation, including the timely filing of pleadings, hardly demonstrates a lack of diligence by death-row inmates who took the state at its word. On this record, there is nothing to suggest that petitioner should have been on notice that his attorney would not abide by AEDPA's filing deadline, *Williams v. Taylor*, 529 U.S. 420, 442 (2000) (examining due diligence in the context of whether a petitioner's failure to develop a factual record in state court precludes a fact hearing in federal court). Nor is there any evidence that "petitioner engaged in intentionally dilatory litigation tactics." *Rhines v. Weber*, 544 U.S. 269, 278 (2005) (setting forth test for determining whether a petition may be stayed so that petitioner may return to state court to exhaust federal claims in state court).

Under these circumstances, habeas petitioners like Lawrence should not be deprived of equitable tolling

because they failed to assume that the state would default on its pledge of "quality representation," and thus never attempted to navigate on their own what this Court has aptly described as the exceedingly complicated nature of capital and federal habeas jurisprudence. *See Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring) ("The complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law."); *Rhines*, 544 U.S. at 279 (Souter, J., concurring) (noting that "*pro se* petitioners (as most habeas petitioners are) do not come well trained to address" such "trick[y]" habeas matters as exhaustion).[14] That is especially true in this case because Lawrence lacked anything close to the intellectual capacity to monitor his registry attorney's performance himself: he suffers from "a limited intellectual ability, impairment of judgment, [and] educational deprivation." Sentencing Tr. (Mar. 17, 1995) at 490.

In any event, filing a timely *pro se* federal petition as insurance in case counsel is late in filing – even assuming the local rules permit such a *pro se* filing, which is often not the case, *see, e.g.*, United States District Court for the Northern District of Florida Local Rule 11.1(D) – hardly serves the ends of judicial efficiency or even a petitioner's own interests. If represented litigants were required to file their own *pro se* habeas petitions to comply with AEDPA's time bar, the courts would be inundated with repetitive filings that, among other things, would increase the risk that later petitions filed by counsel would be rejected as successive.

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[14] Because of the procedural default and exhaustion doctrines applicable to federal habeas review, thorough knowledge of both capital and federal habeas jurisprudence is essential. *See generally* ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, No. 10.15.1 & Commentary (2003).

See 28 U.S.C. § 2244(b).

The availability of equitable tolling when a habeas petitioner has detrimentally relied on a state's assurance that it will provide quality representation, including the timely filing of appropriate pleadings, does not depend on a constitutional right to counsel. *See, e.g., Young v. United States*, 535 U.S. 43, 47-48, 49-50 (2002) (holding that "lookback period" in 11 U.S.C. § 507(a)(8)(A)(i) of Bankruptcy Code subject to traditional equitable tolling principles; "[i]t is hornbook law that limitations periods are customarily subject to equitable tolling") (internal quotation marks omitted). *See also Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989) ("Time requirements in lawsuits between private litigants are customarily subject to equitable tolling").[15] It does not require the Court to address the merits of petitioner's underlying claim. And it does not require the Court to second-guess the strategic judgments of appointed counsel. The relief that petitioner is seeking in this case is therefore quite limited. It is, nonetheless, essential to achieve elemental fairness and to ensure that the state does not benefit from its own misrepresentations, especially when someone's life is at stake.

Florida has, too often, done precisely that. As detailed below, the state has frequently and often successfully sought to dismiss federal habeas petitions filed on behalf of death-row inmates based on a failure by state-selected and state-monitored registry counsel to meet AEDPA deadlines. Equitable tolling is both necessary and appropriate under these circumstances. Without it, many petitioners in Florida may be executed without a federal

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[15] Equitable tolling principles are, of course, doctrinally distinct from the traditional analysis of the effectiveness of counsel provided under the Sixth and Fourteenth Amendments. *See generally Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) (requiring objectively unreasonable attorney errors which cause a reasonable probability of a different outcome to make showing of ineffective assistance of counsel).

court ever reviewing their habeas claims, even if they did not engage in dilatory tactics, *Rhines*, 544 U.S. at 278, and had no reason to believe counsel would fail to meet AEDPA's deadline. *See Williams*, 529 U.S. at 442. This unconscionable outcome will serve neither the hallowed purpose of the Great Writ nor Florida's interest in just capital judgments.[16]

B. Florida Has Not Fulfilled Its Pledge That "Quality" Counsel Will File Appropriate Pleadings "In A Timely Manner."

The results of Florida's unfulfilled pledge of "quality representation" are unsettling. As the following chart demonstrates, Gary Lawrence is one of eight men sentenced to death in Florida, six represented by registry counsel, who since 2004 have had their federal habeas petitions rejected as untimely (appeals, petitions for *certiorari*, and/or requests for certificates of appealability ("COA") are pending in six

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[16] *See, e.g., House v. Bell*, __ U.S. __, 2006 WL 1584475, * 14 (June 12, 2006) (citing *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (cautioning that "[d]ismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty")); *Reed v. Ross*, 468 U.S. 1, 10 (1984) (noting the writ's purpose to "'interpose the federal courts between the States and the people, as guardians of the people's federal rights-to protect the people from unconstitutional action'") (quoting *Mitchum v. Foster*, 407 U.S. 225, 242, (1972)); *Hensley v. Mun. Court*, 411 U.S. 345, 349-50 (1973) ("[H]abeas corpus is not a static, narrow, formalistic remedy, but one which must retain the ability to cut through barriers of form and procedural mazes.") (internal quotation marks and citations omitted); FLA. STAT. ANN. § 27.7001 ("It is the intent of the Legislature to . . . provide for the collateral representation of any person convicted and sentenced to death in this state, so that collateral legal proceedings to challenge any Florida capital conviction and sentence may be commenced in a timely manner and so as to assure the people of this state that the judgments of its courts may be regarded with the finality to which they are entitled in the interests of justice.").

of these cases):

Case Name and Citation:	How late habeas or state postconviction petition filed:
Lawrence v. Florida, 421 F.3d 1221 (11th Cir. 2205), *cert. granted*, __ U.S. __, 126 S.Ct. 1625 (2006).	If this court resolves Question I against Petitioner, he filed his *pro se* habeas petition, while advised by registry counsel, close to four months late.
Howell v. Crosby, 415 F.3d 1250 (11th Cir. 2005), *cert. denied*, __ U.S. __, 126 S.Ct. 1059 (2006).	Registry counsel filed state postconviction motion *fourteen months* after conviction became final, failing to toll AEDPA's clock for later filing.
Cole v. Crosby, No. 05 Civ. 222, 2006 WL 1169536 (M.D. Fla. May 3, 2006), COA request pending, No. 06-13090 (11th Cir.)	"Capital collateral counsel," FLA. STAT. ANN. § 27.701 (1), filed close to sixteen months late.
Wainright v. Crosby, No. 05 Civ. 0027, Dec. and Order, (M.D. Fla. Mar. 10, 2006), appeal pending (11th Cir.).[17]	Registry counsel filed approximately two months late.

[17] The dockets and documents cited for each case which lacks a reported decision may be found on the web site for the respective court by linking to the court's Public Access to Court Electronic Records ("PACER") or Case Management/Electronic Case Filing ("CM/ECF") system. *See, e.g.*, https://ecf.flnd.uscourts.gov/cgi-bin/login.pl (Northern District of Florida). The date noted in each such citation is the date on which the

Sweet v. Crosby, No. 03 Civ. 00844, Dec. and Order, (M.D. Fla. Aug. 5, 2005), appeal pending, No. 05-15199 (11th Cir.).	Registry counsel filed approximately two years late.
Banks v. Crosby, No. 03 Civ. 0032, Dec. and Order (N.D. Fla. July 29, 2005).	Registry counsel filed state postconviction motion *fourteen months* after conviction became final, failing to toll AEDPA's clock for later filing.
Foster v. Crosby, No. 03 Civ. 109, Dec. and Order (N.D. Fla. Dec. 13, 2004), COA denied, 05-10344 (11th Cir. Sept. 30, 2005), *cert.* pending.	Registry counsel filed approximately one year late.
Downs v. Crosby, No. 01 Civ. 139, Dec. and Order (M.D. Fla. Oct. 21, 2004), COA request pending, No. 05-10210 (11th Cir.).	Capital collateral counsel filed approximately one year late.

In addition, the following chart shows that eight other inmates on Florida's death row – all represented by registry counsel – have federal habeas petitions pending that the state is arguing should be barred as untimely:

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court ruled that the petition would be rejected as untimely.

The Eleventh Circuit has not yet docketed the appeal in *Wainright v. Crosby*, though a notice of appeal has been filed in the district court, which has transmitted relevant parts of the record to the Eleventh Circuit. PACER does not make clear whether a COA has been issued or requested in this case.

Case Name and Citation:	State's Contention:
Holland v. Crosby, No. 06 Civ. 20182 (S.D. Fla.).	Thirty-eight days after registry counsel missed deadline, petitioner filed *pro se*.
Brown v. Crosby, No. 06 Civ. 00142 (M.D. Fla.).	Registry counsel filed approximately one year late.
Asay v. Crosby, No. 05 Civ. 00147 (M.D. Fla.).	Registry Counsel filed approximately seven months late.
Hamilton v. Crosby, No. 05 Civ. 813 (M.D. Fla.).	Registry counsel filed state postconviction motion *more than fourteen months* after conviction became final, failing to toll AEDPA's clock for later filing.
Johnson v. Crosby, No. 05 Civ. 23293 (S.D. Fla.).	Registry counsel filed state postconviction motion *more than three years* after conviction became final, failing to toll AEDPA's clock for later filing.[18]

[18] The St. Petersburg Times reported that Johnson's registry attorney publicly admitted in 2000 that he missed the deadline and withdrew from the case without filing either a state post-conviciton motion or a habeas petition, because although he knew that the field of postconviction litigation was "specialized, [he] did not know to what extent." The attorney reportedly admitted that "[i]t was a terrible mistake for [him] to get involved" as registry counsel. Jo Becker, *System May Be Slowing*

Gordon v. Crosby, No. 04 Civ. 0035 (M.D. Fla.).	One month after registry counsel missed deadline, petitioner filed *pro se*.
Damren v. Crosby, No. 03 Civ. 0039 (M.D. Fla.).	Registry counsel filed approximately seven months late.
Thomas v. McDonough, 03 Civ. 00237 (M.D. Fla.).	Registry counsel filed approximately fifteen months late.[19]

In short, notwithstanding Florida's assurance of "quality" representation, including the filing of appropriate pleadings in a timely manner, the legal representation provided by the state and purportedly monitored by its courts has led directly to an intolerably long list of capitally-sentenced defendants who may never have an opportunity to pursue federal habeas review.

C. Florida Has Long Known That Its Registry Counsel System Is In Crisis, Including Repeated Failures To File Timely Pleadings.

Florida and its courts have long known about the severe deficiencies of the registry counsel system. Charged with overseeing registry counsel, FLA. STAT. ANN. § 27.711 (12), the Florida courts became aware as early as 1998 that the transition from capital-collateral relief counsel to registry

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Appeals: Introduced as a Way to Streamline the Death Penalty Process, a Registry System Using Private Defense Attorneys Has Led to Delays, Critics Say, ST. PETERSBURG TIMES, July 17, 2000, at 1B.

[19] In three of these cases, *Asay*, *Damren*, and *Thomas*, the district court has assigned a separate attorney to argue for equitable tolling of the statutory deadline. *See, e.g., Asay v. Crosby*, No. 05 Civ. 00147, Order (M.D. Fla. Feb. 27, 2006) (omnibus order pertaining to all three cases).

counsel had created a backlog of people on death row who had no lawyers, even while AEDPA's one-year clock was running. *See In Re Rules of Criminal Procedure 3.851 & 3.850*, 719 So.2d 869 (Fla. 1998) (addressing practical implications of newly-enacted FLA. STAT. ANN. § 27.710 (5)). As the Florida Supreme Court stated, in that year, "the registry of attorneys will have to be established before trial courts can appoint private counsel as required by the legislation and . . . a large number of attorneys will need to be included in the registry because of the many capital postconviction defendants that may fall within the categories under which private counsel will have to be appointed." *Id.* at 870.

According to Florida Bar and media reports, Florida legislators and Florida Supreme Court justices have repeatedly complained publicly, including in Florida's legislative record, about the poor quality of representation from registry attorneys. *See* Carl Jones, *State Officials Appeal to Florida Supreme Court on Attorney Fee Caps*, DAILYBUSINESSREVIEW.COM, May 15, 2006 (reporting that while Governor "argues that private lawyers are better and cheaper. . . [,] many legal experts, Democrats in the Legislature and some Republican Legislators, disagree. . . . State Senator Victor Cris, R-Tampa, a member of the Commission on Capital Cases . . . criticized the 2003 switch from the statewide [Capital Collateral Regional Counsel] system to the mixed system using both state-employed and registry lawyers. 'We had a system that wasn't broke and was functioning well before we went into this private counsel . . .") (available without payment at http://www.aclufl.org/news_events/alert_archive/index.cfm?action=viewRelease&_emailAlertID=1856 (last visited June 14, 2006); Jan Pudlow, *Justice Rips Shoddy Work of Private Capital Case Lawyers*, THE FLORIDA BAR NEWS, March 1, 2005 (recording remarks of Florida Supreme Court Justice Raoul Cantero during Florida Senate Committee on Justice

meeting of February 16, 2005: "*I think some of the worst lawyering I've seen is from some of registry counsel*, unfortunately. If you look at some of the oral arguments, you will understand why. It seems to me some registry counsel have little or no experience in death penalty cases. They have not raised the right issues, from our review of the record. . . In arguments, they are unable to respond to questions or don't know what the record shows. They don't have a real good understanding of death penalty cases, I don't think.") (emphasis added). Chief Justice Barbara Pariente wrote a letter to Roger Maas, Executive Director of the Commission on Capital Cases,[20] in which she stated: "As for registry counsel, *we have observed deficiencies and we would definitely endorse the need for increased standards for registry counsel, as well as a continuing system of screening and monitoring to ensure minimum levels of competence.*" *Id.* (emphasis added).

The severe deficiencies in the registry counsel system were well known in 2003, when Florida expanded the registry system to cover the northern region of the state. *See Death Appeals Not Quite Dead*, DAILYBUSINESS REVIEW.COM, April 30, 2003 (reviewing several problems with registry counsel, including missed federal deadlines, attempting to charge clients additional funds for their work, and charging Florida exorbitant sums for shoddy work) (available without payment at http://www.fadp.org/news/bizrev_5_20.html) (last visited June 1, 2006). Interviewed for a 2003 article, Mr. Maas cautioned against proposals to eliminate the other two regional offices of Capital Collateral Regional Counsel because "there are

[20] Florida's Commission on Capital Cases oversees the registry. FLA. STAT. ANN. § 27.2710 (1). The Commission is a six-member body, including two members appointed by Florida's governor, two members appointed by the Florida's Senate, and two members appointed by its House of Representatives. FLA. STAT. ANN. § 27.709. The Commission is staffed by Florida's Office of Legislative Services. *Id.*

problems with the registry. There's an inability to directly control the lawyers, to make sure the cases are being worked." *Id.* Demonstrating that the Florida legislature was aware of these problems, the article also reviewed several changes to the registry system recommended by Florida's Legislative Accountability Office, including a recommendation for increased training and additional prior experience. *Id.*

In fact, Florida was on notice of the registry system's deficiencies as early as 2000, two years after its creation, when reports emerged that registry attorneys were failing to provide quality representation and that their failures included missing deadlines for filing federal habeas corpus petitions. *See* Becker, *supra* n.21, at 1B. The Becker article reported that "[i]n six of the cases in which private attorneys are being paid to pursue required death penalty appeals, lawyers have blown deadlines that could preclude their clients from having their claims heard in federal court." *Id.* The article also suggested that the fault for missed deadlines was attributable in part to the Commission on Capital Cases itself because the "training manual Maas gave the [registry] lawyers as recently as January [of 2000] mistakenly said there are no federal deadlines, a point later corrected." *Id.*

Thus, Florida has long known that, despite its assurance of "quality representation," its registry system has repeatedly resulted in missed habeas deadlines.

* * *

Florida induces reasonable reliance by capitally-sentenced persons on its pledge to ensure, through court monitoring, the quality of registry attorneys, including the filing of appropriate pleadings in a timely manner. Petitioners on Florida's death row may obtain fair review of their capital sentences only through extraordinarily complicated and intertwining state and federal judicial procedures. When they are assigned registry counsel, they

have no choice but to accept counsel's representation, backed by Florida's pledge to monitor such representation, or to forgo such representation by appearing *pro se* and attempting to navigate this labyrinthine system without the aid of counsel. So long as a petitioner has otherwise acted with due diligence, his detrimental reliance on the state's representation of "quality" counsel is an extraordinary circumstance warranting the application of equitable tolling if registry counsel misses the AEDPA's clear filing deadline. It is certainly not unfair for Florida to bear the cost of a petitioner's detrimental reliance on its misrepresentation by limiting the state's ability to rely on the AEDPA's statute of limitations. And for a petitioner who detrimentally relied on Florida's unfulfilled assurance of quality representation by an attorney who will file timely pleadings, surely equitable tolling, merely providing the petitioner a chance to be heard on federal habeas review, is the only fair and just result.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed.

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No. 05-8820

In the
Supreme Court of the United States

GARY LAWRENCE,
Petitioner,

v.

STATE OF FLORIDA
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF THE STATES OF ALABAMA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, MISSISSIPPI, MISSOURI, NEW HAMPSHIRE, NEBRASKA, NEVADA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WASHINGTON, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether AEDPA's statute of limitations is tolled during the time a petition for writ of certiorari brought pursuant to 28 U.S.C. §1257 is pending before this Court after the entry of final judgment in the underlying state-court proceedings.

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INTEREST OF AMICI

The *amici* States provide prisoners with opportunities to challenge their convictions and sentences through processes governed by state law and procedural rules. *Amici* have implemented these post-conviction procedures to obtain the first opportunity to correct any and all alleged federal constitutional deficiencies. *Amici* have a vested and acknowledged interest in defending final criminal judgments, as well as in exercising their duty under the Constitution to correct errors in appropriate cases.

The position advocated here by Lawrence directly implicates these interests by extending AEDPA's statute of limitations without respect to either the purpose of AEDPA's tolling provision or the compelling interest in finality.

SUMMARY OF THE ARGUMENT

AEDPA's tolling provision is inextricably intertwined with the habeas statute's exhaustion requirement. Lawrence's position here - which would require tolling for certiorari petitions to this Court pursuant to 28 U.S.C. §1257 - bears no relationship to the balance between exhaustion of state-court remedies and the limitations period that underlies the tolling provision itself.

Furthermore, certiorari proceedings in this Court are filed pursuant to federal statute, §1257, and are limited to the review of "final judgments or decrees" of state courts. Accordingly, §1257's grant of jurisdiction is only available *after* the state-court proceedings have come to a close. Lawrence's position is fatally flawed inasmuch as he wishes to use as the basis for tolling AEDPA's statute of limitations a *federal*-court proceeding brought pursuant to *federal* statute. Because AEDPA's tolling provision is limited to pending *state*-court proceedings, Lawrence's argument must fail.

Importantly, affirming the judgment below will not result in the loss of §1257 certiorari review as a potential avenue for state prisoners. An affirmance will do nothing but deprive Lawrence of a federally-subsidized application for discretionary review by this Court. Because certiorari review in this Court is not necessary for exhaustion, however, there is no basis for insisting on tolling the statute of limitations during the pendency of a certiorari petition filed under §1257.

ARGUMENT

I. Because Certiorari Review Of A State Post-Conviction Proceeding By This Court Does Not Affect—Or Have Anything To Do With—The Exhaustion Requirement, Congress Did Not Intend To Toll AEDPA's Statute Of Limitation During Such Review.

The purpose of the Antiterrorism and Effective Death Penalty Act of 1996's ("AEDPA's") tolling provision is to balance "the interests served by the exhaustion requirement and the limitation period." *Duncan v. Walker*, 533 U.S. 167, 179 (2001). As this Court noted in *Duncan*, the tolling provision

> promotes the exhaustion of state remedies by protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued. At the same time, the provision limits the harm to the interest in finality by according tolling effect only to "properly filed application[s] for State post-conviction or other collateral review."
>
> By tolling the limitation period for the pursuit of state remedies and not during the pendency of applications for federal review, §2244(d)(2) provides a powerful incentive for litigants to exhaust all available state remedies before proceeding in the lower federal courts.

Id. at 179-80. This relationship between the exhaustion requirement and AEDPA's limitation period fatally undermines Lawrence's position.

AEDPA's purpose is "to further the principles of comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). Accordingly, habeas principles must be shaped by the "historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts," requiring care "to safeguard the States' interest in

the integrity of their criminal and collateral proceedings." *Id.* It is this concern for comity—and for ensuring the integrity of state criminal and collateral proceedings—that gives rise to the federal habeas statute's exhaustion requirement. *Rose v. Lundy*, 455 U.S. 509, 518 (1982) ("Because 'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation,' federal courts apply the doctrine of comity, which 'teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.'") (citing *Darr v. Burford*, 339 U.S. 200, 204 (1950)). Because fairness, in the light of the habeas statute's exhaustion requirement, warranted §2244(d)(2)'s tolling language in the first place, there is no basis for concluding that certiorari review in this Court at the conclusion of state post-conviction proceedings—review that is itself not required for proper exhaustion[1]—falls within the scope of the AEDPA's tolling provisions.

In *Duncan*, this Court emphasized that the phrase "State post-conviction or other collateral review," as used in 28 U.S.C. §2244(d)(2), refers *only* to state-court proceedings. These proceedings, voluntarily initiated by prisoners challenging the validity of their convictions, sentences, or confinements, are brought as state-law causes of action. *Cf. Pennsylvania v. Finley*, 481 U.S. 551, 556-557 (1987) ("Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature."). While States are not

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[1] *See Ulster County Court v. Allen*, 442 U.S. 140, 149 n.7 (1979) (citing *Fay v. Noia*, 372 U.S. 391, 435-38 (1963)) (certiorari petition from denial of state post-conviction relief not part of habeas exhaustion process).

constitutionally obliged to offer opportunities for post-conviction review, when States do offer such review, state prisoners must present their federal claims for state court consideration—*i.e.*, must "exhaust"—prior to pursuing federal habeas corpus relief. *See* 28 U.S.C. §2254(b); *Baldwin v. Reese*, 541 U.S. 27, 29 (2004); *Rose v. Lundy*, 455 U.S. 509 (1982). The exhaustion requirement -- which again, pertains to state-court proceedings only -- necessitated §2244(d)'s tolling provisions.

In *Duncan*, again, this Court recognized that "§2244(d)(2) promotes the exhaustion of state remedies while respecting the interest in the finality of state court judgments." *Duncan*, 533 U.S. at 178. Understanding Congress' intent to promote the exhaustion of *state* remedies, and recognizing that §2244(d)(2)'s tolling language applies only to applications for "State post-conviction or other collateral" review, it is plain that Congress also intended to limit the tolling period to the *state*-court proceedings concerning such applications. It is, again, only the state-court proceedings that are required in order for a state prisoner to properly exhaust his federal claims so as to be entitled to pursue habeas corpus relief.

During the Senate debate on the habeas provisions of the AEDPA - and, indeed, just before the conference report was approved and the law was created - Senator Hatch echoed President Clinton's concern that "it should not take 8 or 9 years *and three trips to the Supreme Court* to finalize whether a person, in fact, is properly convicted or not.'" 142 Cong. Rec. S.3352, S.3353-54 (1996) (statement of Sen. Hatch) (emphasis added). The next day, an excerpt from a Clinton Administration Policy Statement was read into the record. It stated, in part:

> The Administration has consistently and strongly supported habeas corpus reform in order to assure that criminal offenders receive swift and certain punishment. Indeed, the Administration believes that the bill could be improved to provide additional guarantees that offenders have only "one bite at the

> apple" and complete the process even more expeditiously... H.R. 2703 should shorten the duration and reduce the number of reviews for each criminal conviction while preserving the full scope of habeas review so that it can continue to serve its historic function as the last protection against wrongful conviction.

142 Cong. Rec. S.3443 (1996) (Statement of Administration Policy introduced as Exhibit by Sen. Moynihan).

These statements support this Court's previous holdings that AEDPA's tolling provisions are designed to move state prisoners expeditiously into federal habeas corpus review to advance the States' interest in preserving the validity of final criminal convictions. In Senator Hatch's words, it should not take "three trips to [this Court] to finalize" a state prisoner's conviction. The language of the AEDPA makes clear that the first opportunity for review by this Court - *i.e.* at the conclusion of the direct appeal process - was not the basis for Senator Hatch's statement, as the statute of limitation does not begin to run until after this Court's direct-appeal review is completed. Further, Congress did nothing to restrict the ability of unsuccessful habeas petitioners to seek relief in this Court at the conclusion of the federal habeas appeals process. Instead, in enacting AEDPA, Congress targeted the discretionary second-trip (so to speak) review of final judgments in state post-conviction proceedings brought under 28 U.S.C. §1257. Congress did not take away this avenue of appeal entirely (*see infra* at 9-10) but rather simply refused to count the time such a discretionary appeal is pending against the State (and in favor of the person in State custody) under AEDPA's statute of limitation.

Because AEDPA's exhaustion requirement was the primary consideration behind §2244(d)'s tolling provisions, the exhaustion requirement itself, as described in 28 U.S.C. §2254(b), should inform this Court's understanding of AEDPA's tolling provision. AEDPA's exhaustion

requirement consistently refers to exhaustion in terms of seeking relief in the "courts of the State." 28 U.S.C. §§2254(b)(1)(A), 2254(b)(2), and 2254(c). By specifically referencing remedies available in the "courts of the State," Congress signaled that it had no concern for the ability of applicants to proceed at the close of state processes before this Court pursuant to 28 U.S.C. §1257. By the same token, Congress expressed no concern with state prisoners failing to "exhaust" state remedies by seeking review in this Court.

In *Carey v. Saffold*, 536 U.S. 214, 220 (2002), the fear of producing a "serious statutory anomaly" led this Court to reject California's interpretation of AEDPA's tolling provision as it applied to California's unique post-conviction process. This Court specifically emphasized that a §2254 federal habeas petitioner fails to exhaust his remedies as long as he maintains "'the right under the law of the State to raise' *in that State*, 'by any available procedure, the question presented.'" *Saffold*, 536 U.S. at 220 (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)) (emphasis added). Lawrence's interpretation of *Saffold* here is flawed both because it fails to account for the singular importance of state-court review ~~and because~~ it treats §1257 certiorari proceedings in this Court *following* state post-conviction processes as *part* of the state process, rather than as a separate review pursuant to a federal statutory grant of authority under §1257. Lawrence's suggestion that "the process of seeking certiorari [is] an equally significant extension of the proceedings on the original [state court] application" (Pet. Br. 18) is, with respect, question-begging and is irreconcilable with this Court's consistent emphasis on the importance of exhaustion of *state* remedies in *state* court proceedings.

Because AEDPA's tolling provision is concerned with securing for potential federal petitioners the opportunity to present and exhaust claims through the procedures offered by individual States, this Court should reject Lawrence's attempt to shield *federal*-court review brought pursuant to

federal statute (*i.e.*, 28 U.S.C. §1257), under AEDPA's tolling provision. To hold to the contrary would defeat the purpose of AEDPA by allowing the presentation of federal claims to a federal court to toll the time for presenting the very same federal claims to other, arguably more appropriate, federal courts. Such a scenario would be equally anomalous as the scenario this Court sought to avoid in *Saffold*.

II. Petitions For Certiorari Review By This Court Following State Post-Conviction Proceedings Are Filed Not Pursuant To State-Created Post-Conviction Actions But, Rather, Pursuant To Federal Statute.

Persons in state custody, of course, have the right to petition this Court for certiorari review following the denial of a state post-conviction application for relief. But that right does not arise under any state-created process, but rather under the congressional grant of §1257 jurisdiction. As this Court reiterated in *Johnson v. California*, 541 U.S. 428, 429 (2004), jurisdiction under §1257 is limited to review of "final judgments or decrees" from the highest court of a State in which a judgment could have been had. The previous year, in *Nike, Inc. v. Kasky*, 539 U.S. 654, 658 (2003), this Court likewise emphasized that such review is based on a congressional grant of jurisdiction to review state-court judgments *after they become final*. Thus, upon the final denial of state post-conviction relief, further review is permitted only to the extent provided by the congressional grant of jurisdiction under §1257. The fact that petitions for certiorari to this Court following the denial of state post-conviction relief are limited to final judgments demonstrates that such proceedings are qualitatively different from the state post-conviction procedure set up under state law and, instead, are creatures of federal statute.

Accordingly, there is no basis for this Court to conclude that proceedings under §1257 following the denial of a state application for post-conviction relief are part of a "properly filed application for State post-conviction" review. By the time this Court gains jurisdiction to review such a petition

for writ of certiorari, the State post-conviction process has reached its terminus.

III. The Fact That Petitions For Certiorari Review Following State Post-Conviction Proceedings Do Not Toll AEDPA's Statute Of Limitation Does Not Result In The Deprivation Of This Avenue Of Appellate Review.

While Congress did not intend to subsidize, as it were, petitions for certiorari review by this Court following final judgments in state post-conviction proceedings by tolling the habeas corpus statute of limitation during the pendency of the certiorari process, this avenue of review remains available. Congress simply (and sensibly) acted to get litigants expeditiously into federal habeas corpus proceedings as soon as possible following the conclusion of state post-conviction review.

Under 28 U.S.C. §1257, state prisoners can, of course, continue to present federal constitutional questions to this Court upon the completion of state post-conviction proceedings in state courts. Again, however, such review is not sought pursuant to a state post-conviction review process but, instead, pursuant to jurisdiction granted this Court by federal statute. The fact that prisoners may seek certiorari review pursuant to a federal statute, however, does not require tolling of the AEDPA statute of limitations, as this review has absolutely no effect on AEDPA's exhaustion requirement. Congress' acknowledged intent in enacting AEDPA was to decrease the amount of time required for state prisoners to proceed through the three levels of appeal. The only manner in which the "three trips to the Supreme Court" referred to by Senator Hatch can be mitigated as intended by Congress is for the time for seeking such review following state post-conviction proceedings not to toll §2244(d)'s statute of limitation.

While AEDPA's limited tolling provision might theoretically lead to this Court reviewing a final judgment in

a state post-conviction proceeding while the subsequent federal habeas corpus proceeding is ongoing, this fact alone surely does not warrant ignoring the tolling provisions. (Grants of certiorari from State post-conviction proceedings, historically, are quite rare.) This Court already has approved a "stay and abeyance" procedure applicable where "good cause" exists for a habeas petitioner to return to state court to pursue state court remedies. *Rhines v. Weber*, 544 U.S. 269 (2005). Thus, in the exceedingly rare instance in which this Court grants certiorari to review a final judgment in a state post-conviction proceeding, sensible procedures are already in place to accommodate the federal habeas process. First, this Court could grant a stay of its own right. Second, any ongoing federal habeas action simply could be stayed by a federal district court pending review by this Court pursuant to the already approved stay-and-abeyance procedure.

CONCLUSION

For the foregoing reasons, the Eleventh Circuit's judgment should be affirmed.

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